PUBLIC UTILITIES FORTNIGHTLY 25th ANNIVERSARY 1929-1954

Public Utilities

FORTNIGHTLY

Volume 54 No. 7 September 30, 1954

GREETINGS • ATA ANNUAL CONVENTION • SEPTEMBER 27-30, 1954

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What's Happening to Transit?
By Laurence Wingerter

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A Businesslike Cure for Rush-hour Cramps
By George W. Keith

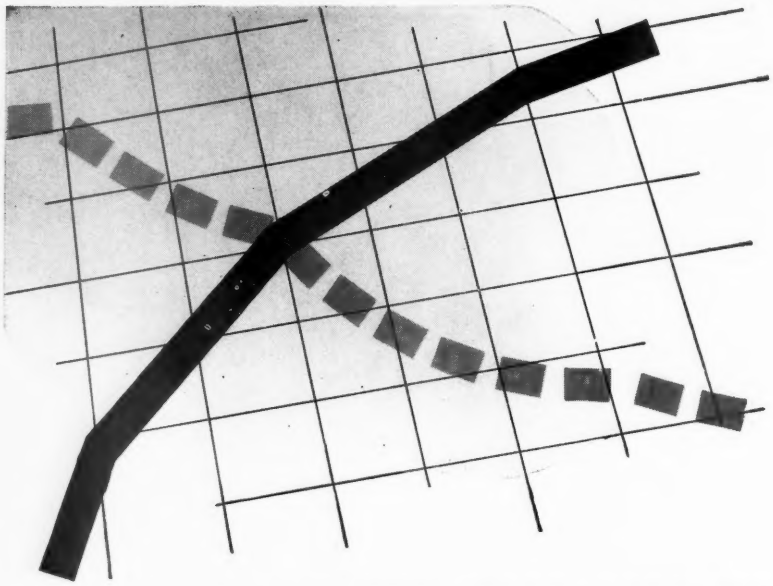
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National Aspects of Transit's Public Relations
By John J. Hassett

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Addresses on Public Utility Problems—Public Utility Law Section—American Bar Association—Appendix

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United States and possessions $15.00
Pan American countries $15.00
Canada $16; all other countries $17.50

Entered as second-class matter April 29, 1915, under the Act of March 3, 1879, at the Post Office at Baltimore, Md., December 31, 1936. Copyrighted, 1954, by Public Utilities Reports, Inc. Printed in U. S. A.

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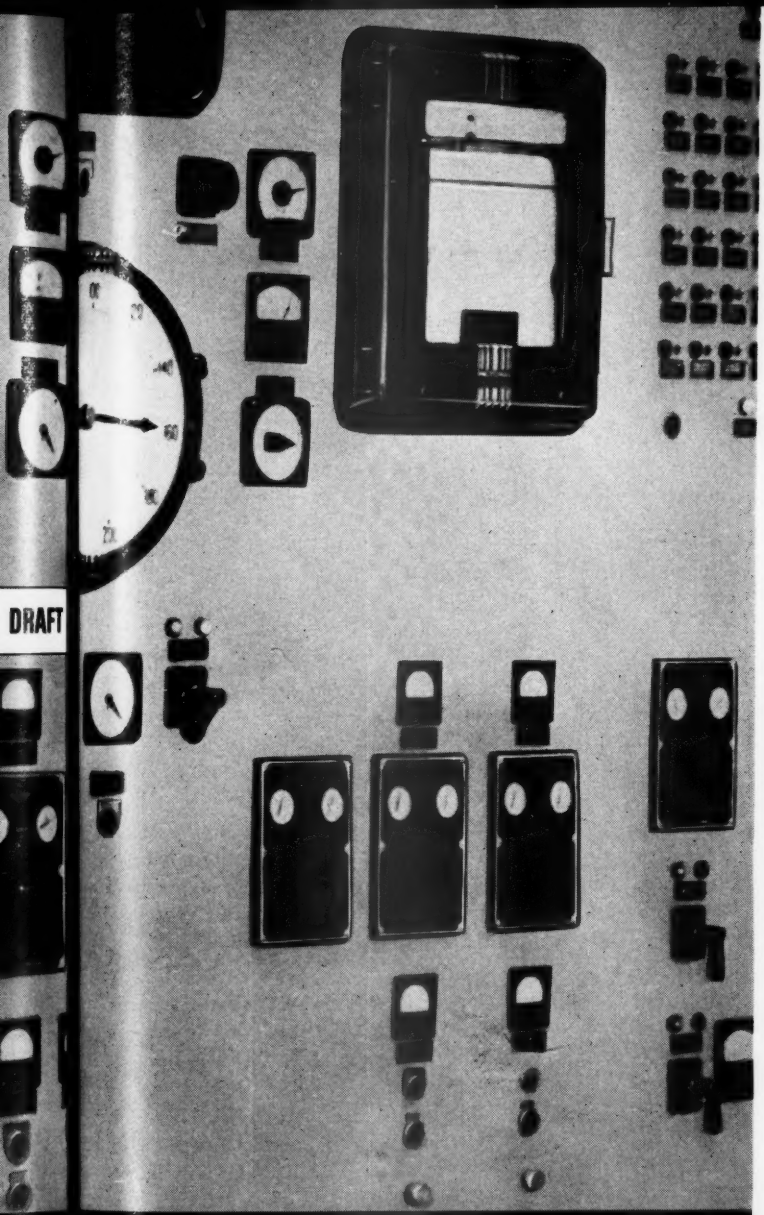
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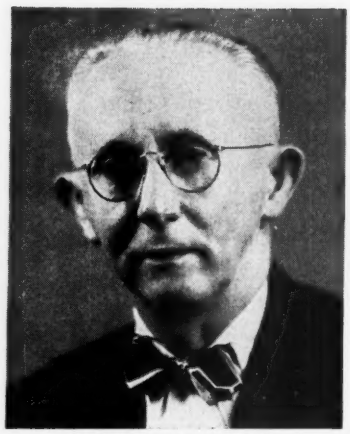
PUBLIC transportation seems to be in danger of drifting into such an adverse financial situation that it can only be operated in some places as a government monopoly. This advent of public ownership by default in the transit field of urban transit is by no means inevitable for there are a number of sound and wise alternatives.

IT is these alternatives which will probably command the attention of those attending the American Transit Association meeting in Pittsburgh, September 27th to 30th. Following our annual custom, we present in this issue matters of particular interest to our readers of the transit industry and wish them success with their annual meeting.

ONE of the more hopeful developments in this situation is the growing sensitivity of municipal officials to the difficulties which would be dumped on their doorstep if private enterprise is allowed to sink. Mayors and city councils would be subjected to political pressure previously unknown. And nobody seems to have any illusion that service would be more economical and efficient if it were operated by City Hall. This is quite a different situation than prevailed during past decades of rosy-hued discussions about social control of public services. On the contrary, there seems to be a disposition on the part of responsible city officials to go to great lengths to avoid the necessity of municipal operations. They have cause to recognize real responsibilities and headaches when they see them coming.



LAURENCE WINGERTER



GEORGE W. KEITH

ODDLY enough, this more realistic attitude in favor of continued private enterprise is not so apparent in our foreign-aid program. Recently our Foreign Operations Administration decided that roughly half of the railway equipment our government is buying for India will be purchased in this country, and the other half abroad.

A SCRIPPS-HOWARD newspaper chain editorial immediately asked, why should we be doing all this for India in the first place? When our country was in a like state of development, no one gave us free equipment. Railway construction was financed in part by federal land grants, and in part by private capital, a substantial part of which came from foreign investors. India could do the same.

OF course, the railway system in India is to be a government monopoly, in which



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2. See how good lighting and good use of power promote production and prosperity. Use the ideas in this magazine. For example:

High frequency heat speeds production

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The 1953 Metals Show — new ideas

Modern methods to conserve man-hours

Customers use Electrified Industry ideas. Their use adds to your net revenue.

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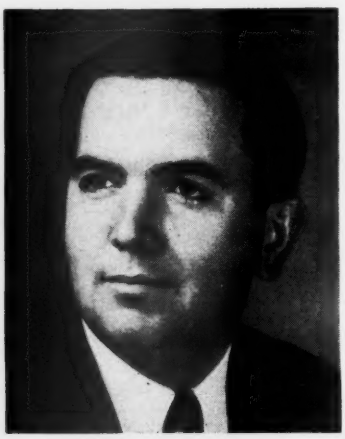
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private investment may not be desired. But why should the United States finance Socialism abroad when it opposes it here? The Scripps-Howard editors have a persuasive point.

GETTING back to our domestic transit industry, the past twelve months have been referred to by some transit service operators as "the year of the great awakening." It has been a year when the transit industry has placed its cards squarely on the table with the public.

FOR our leading article in this issue, LAURENCE WINGERTER, president of the American Transit Association, has written a comprehensive and thoughtful statement about economic and regulatory developments in the transit industry over the past year. Faced with a decline in patronage, the passengers will eventually have to write their own ticket as to whether they want adequate service and are willing to pay for it.

MR. WINGERTER is a native of Wheeling, West Virginia, and a graduate (BS, '28) of Notre Dame. After serving as a student engineer with the Westinghouse Electric Company, he entered into the transit industry as a publicity director for the Gary Railroad Company. He has also seen transit service in Des Moines and Indianapolis. He became vice president of the American Transit Association in 1942, of which he is now president and general manager.



JOHN J. HASSETT

GEORGE W. KEITH, business writer of Cincinnati, has conducted an "off-the-cuff" interview with operators of privately owned off-street parking facilities. His resulting article begins on page 357. The purpose is to determine the prevailing view on the ability of private enterprise to handle the parking of private automobiles with the incidental benefit of increased efficiency and more economical transit operation. With government and business each functioning in its own sphere, it is believed that venture capital can be found to finance the solution of traffic congestion and parking difficulties.

* * * *

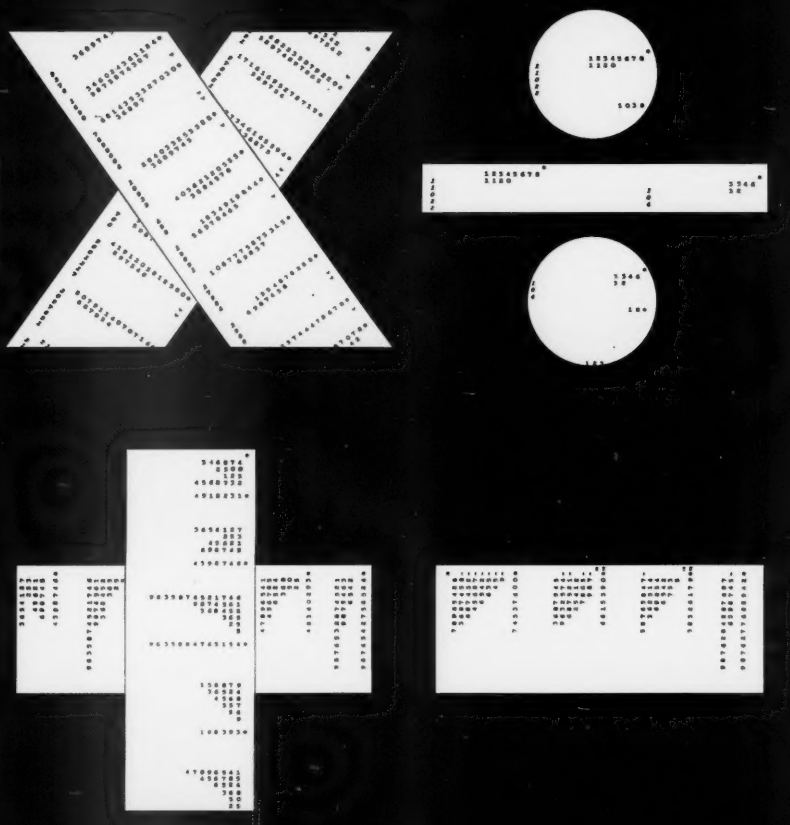
THE economic problems of the transit industry since the end of the war have spread some public confusion and misunderstanding concerning those who are still trying to operate on the traditional basis of free enterprise in public service. Inexperienced people have been attracted by mythical opportunities for quick turnover and private gain. Some local authorities have become complacent with the thought that mass transit is indispensable and can be substituted by private automobiles. JOHN J. HASSETT, Washington author of business articles and public relations counselor, whose contribution begins on page 367, has explored these dangerous trends and the need of better public relations to offset them in the harassed transit industry.

* * * *

NOT only legal, but economic and financial problems of operating public utilities engaged the attention of the Section of Public Utility Law of the American Bar Association. The appendix published with this issue, contains the texts of the various addresses given at the sessions of the annual meeting of the Section of Public Utility Law during the American Bar Association convention at The Blackstone hotel in Chicago, Illinois, August 16th, 17th, and 18th.

THE next number of this magazine will be out October 14th.

The Editors



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THE GAS INDUSTRY PUTS ACCENT ON ACTION

A comprehensive report of the year's progress toward industry objectives is presented by the American Gas Association's president, E. H. Eacker, who is also president of Boston Consolidated Gas Company. The success of the Gas Industry Development Program and the united industry's efforts to improve community and public relations are discussed in the leading feature of this special issue devoted to topics of immediate concern to people in the gas business and allied fields. As suggested in the title of the AGA president's message—deeds, not words, are getting first prizes in the industry these days

THE PHILLIPS CASE DECISION AND THE PUBLIC INTEREST

Shortly after the U. S. Supreme Court handed down its decision on June 7th in the now historic Phillips Petroleum Company Case, predictions fell thick and fast concerning the likelihood that the court's mandate would be the subject of remedial legislation in the 84th Congress. Among the leaders outspokenly opposed to the regulation of independent gatherers and producers of natural gas and oil is the Honorable Lyndon B. Johnson, U. S. Senator from Texas, and a minority leader in the upper chamber. The Senator has expressed his views upon the need of such action.

REGULATORY OBLIGATIONS OF THE GAS PRODUCERS

Just what are the requirements of the mandate of the U. S. Supreme Court as carried out by the Federal Power Commission under its Orders 174 and 174-A? This question is answered by Jerome M. Alper in a clear and forthright manner for the benefit of those who are now considered "producers or gatherers" of gas under the court's interpretation of the Natural Gas Act. Until such time as the Congress may see fit to change the law for individuals or corporations in this category, here is a bit of timely and sober advice from a legal specialist who is close to the Washington scene.

THE NATURAL GAS ACT

Oil and gas production, by their nature, require regulation under state law—efficient and reasonable regulation by the states is the best way to prevent undue federal authority. A member of the Federal Power Commission explains his personal views on this. The author, the Honorable S. L. Digby, is a former Louisiana gas conservation commissioner who recognizes that much confusion now prevails regarding the Natural Gas Act.

A FAIR RETURN FOR A NATURAL GAS UTILITY

The interrelationship of factors which go to maintain the strength of the gas industry and the importance of the part played by the regulatory commission are capably set forth in an article by Milford Springer, general counsel of Southern Counties Gas Company of California. Investor confidence, prompt and adequate service, capital attraction, system expansion, compensatory rates, adequate earnings—the full complement of elements which, put together, make for a strong industry are well presented in this forthcoming article, with particular emphasis on the state commission.

INTERIOR'S OIL AND GAS DIVISION AND THE GAS INDUSTRY

The O&G division of the Interior Department was reconstituted in May, 1954, as the official successor to the Petroleum Administration for Defense (popularly known simply as PAD). The O&G division has inherited certain characteristics from its forebears. Its functions are a mixture of the advisory duties of the earlier division and the more mandatory power of PAD. The acting director, Hugh A. Stewart, takes us inside Interior for a résumé of the facts and general tendencies of the division.

A LETTER TO THE MARQUIS DE LAFAYETTE

A year or so ago, in an all-electric issue, free-lance writer George W. Keith took quill in hand to write a letter to Ben Franklin on the developments in the field of electric power since the date Franklin flew his kite in a thunderstorm. Now, Keith writes to one of Franklin's contemporaries, the Marquis de Lafayette, to tell him how it has gone in the gas industry since Lafayette's visit to Fredonia, New York, in the early days of the use of natural gas as a lighting and cooking fuel in this country. A most engaging account.

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Also . . . ***Special financial news, digests, and interpretations of court and commission decisions, general news happenings, reviews, Washington gossip, and other features of interest to public utility regulators, companies, executives, financial experts, employees, investors, and others.***

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—MONTAIGNE

WILLIAM RANDOLPH HEARST
Late publisher.

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G. MENNEN WILLIAMS
Governor of Michigan.

"A resurgence of automobile buying would result in higher income tax revenues from both business and private individuals."

DONALD H. MACKAY
Mayor of Calgary, Alberta, Canada.

"The motor vehicle driver, whether he be a private motorist, a salesman driver, a bus driver, a truck driver, or a taxicab driver, is the focal point for major attention in the constant attack on traffic accidents."

MERWYN A. KRAFT
Director, department of personnel and accident prevention, American Transit Association.

"The public conveyance vehicle and the privately owned automobile are competing for a roadway that has long since passed the law of diminishing returns in so far as its ability to satisfy both demands is concerned."

EDITORIAL STATEMENT
The Akron (Ohio) Beacon Journal.

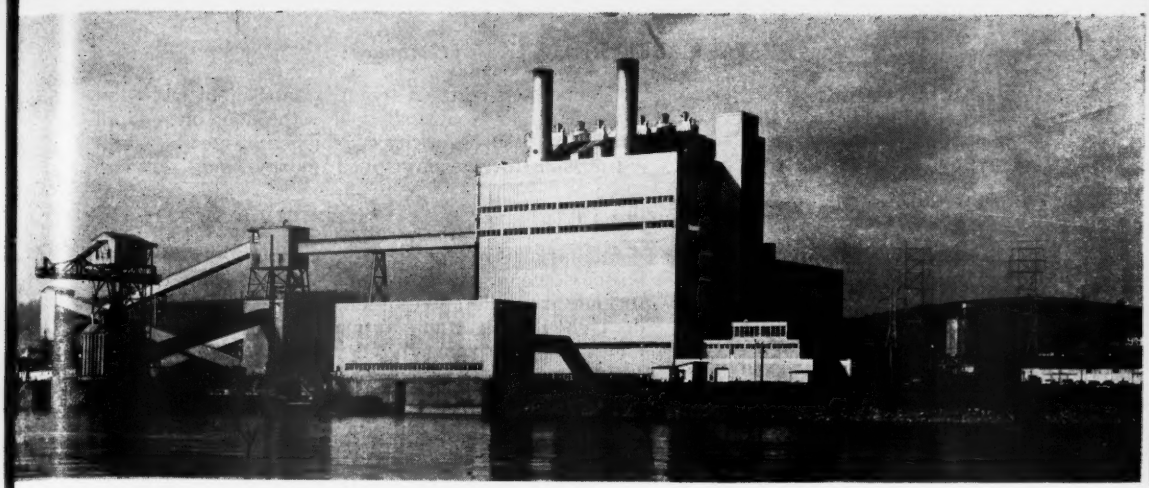
"There is, of course, a relationship between fares and bus riding, but cost is far from the whole explanation for the business decline which all bus companies have suffered since the end of the war. As a matter of fact, we should guess that for every person who has quit riding busses because he thinks fares are too high, ten have quit because they no longer feel compelled to economize on transportation."

CHARLES E. WILSON
Former president, General Electric Company.

"Whatever we can do in Edison's name to gain deserved recognition and credit for the electrical industry's contributions to our national welfare, he would, I am sure, heartily endorse and applaud. This is a particularly appropriate time to press home a greater awareness of the desirability and advantages of better lighting. Lighting was the industry's first service and is still the great common denominator."

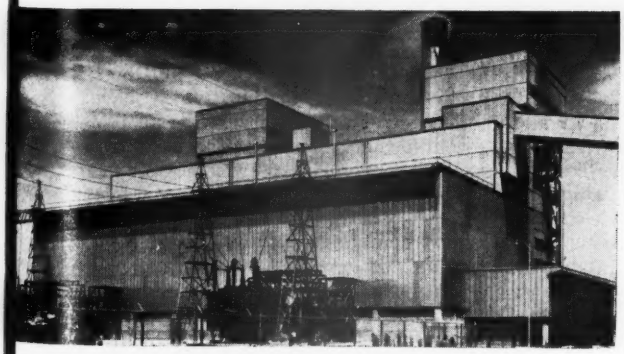
JOHN W. BRICKER
U. S. Senator from Ohio.

"Since regulatory and promotional policies inevitably produce transport roadblocks, Congress should remove them before they become serious. Only by promptly removing such impediments can the Congress hope to preserve the inherent advantages of each mode of transportation. The penalty for not clearing transport roadblocks is a transportation crisis leading first to nationalization of one segment of the industry and eventually to socialization of the whole transport system."



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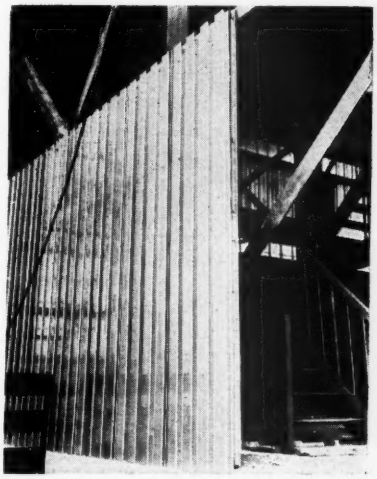
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EDITORIAL STATEMENT
The Kansas City Star.

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F. J. JOHNSON
President, The Louisville Transit Company.

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HERBERT HOOVER
Former President of the United States.

"The imperative need of this nation, at all times, is the leadership of the uncommon men or women. We need men and women who cannot be intimidated, who are not concerned with applause meters, nor those who sell tomorrow for cheers today."

A. D. MARSHALL
Manager, employee benefit services department, General Electric Company.

"To have real retirement security with freedom we must, through investments, in homes, in bonds, in stocks, in life insurance, etc., build the program which will exactly fit the need of ourselves and our families. Government and employer plans can only be a base on which we can build. This is the challenge to employers and all others interested in our free competitive enterprise system."

SHERMAN R. KNAPP
President, The Connecticut Light & Power Company.

"I have been afraid sometimes that there is a tendency for us to become complacent in the false belief that our industry's future growth is in no way related to our policies and efforts. I am not going to argue the point, but I would like to say with all solemnity that I know of no product, no cause, no idea which has won public understanding and acceptance without that force of active belief variously called selling, or merchandising, or promotion."

A. A. STAMBAUGH
Chairman of the board, Standard Oil Company of Ohio.

"Industry very often has felt that it is misunderstood by its friends, to which I subscribe. I am sympathetic with those industry-supported agencies which have been attempting to interpret the American system of free enterprise to our people. These approaches, however sound, have had some inherent weaknesses, one of which, however unjustified, is the charge sometimes made that industry's story is one-sided and self-serving; another is that such attempts very often do not reach the right people."

FRANK E. MCCASLIN
President, Oregon Portland Cement Company.

"Sound policies for the use and development of these [our natural] resources must embody the principle of the greatest possible co-operation between private enterprise and all levels of government. At the same time, the private enterprise must be allowed to manage our natural resources without governmental domination and control, if we are to be assured of maintaining the foundations of America's industrial progress. No one is more aware today of the necessity of managing and perpetuating these natural resources without exploiting them than are the industries dependent upon them."

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World's first close-coupled, cross-compound reheat turbine completes first year of operation, sets pattern for future power generation.

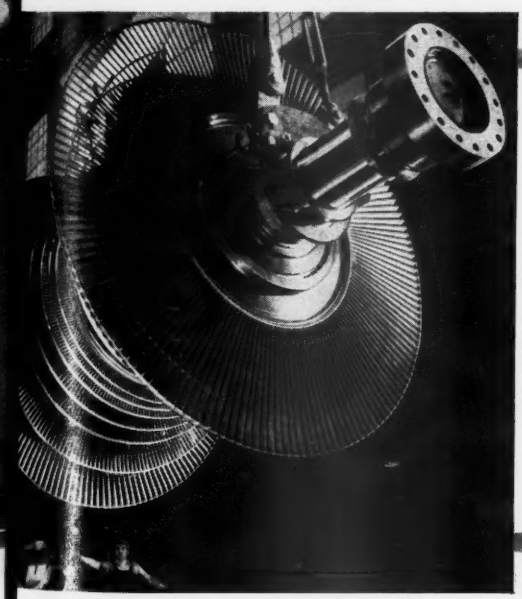
WISCONSIN ELECTRIC POWER COMPANY'S first unit at its new Oak Creek Station has proven design features that open new possibilities for steam turbine development. One additional Allis-Chalmers unit of the same type is being installed, another is under construction.

Close-coupled design makes a compact unit possible. It can be installed transversely or longitudinally in the turbine room with minimum crane span and still stay within space limitations of the boiler. End result is a smaller building with smaller turbine foundation. The entire unit rests on a single foundation. With the shafts so close together, oil piping can be reduced to a single feed and single drain line for both high and low speed machines. Steam piping is short and direct. A short "cross-under" carries steam from the intermediate pressure turbine to the center of the double-flow, low pressure 1800-rpm turbine.

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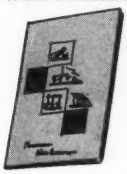
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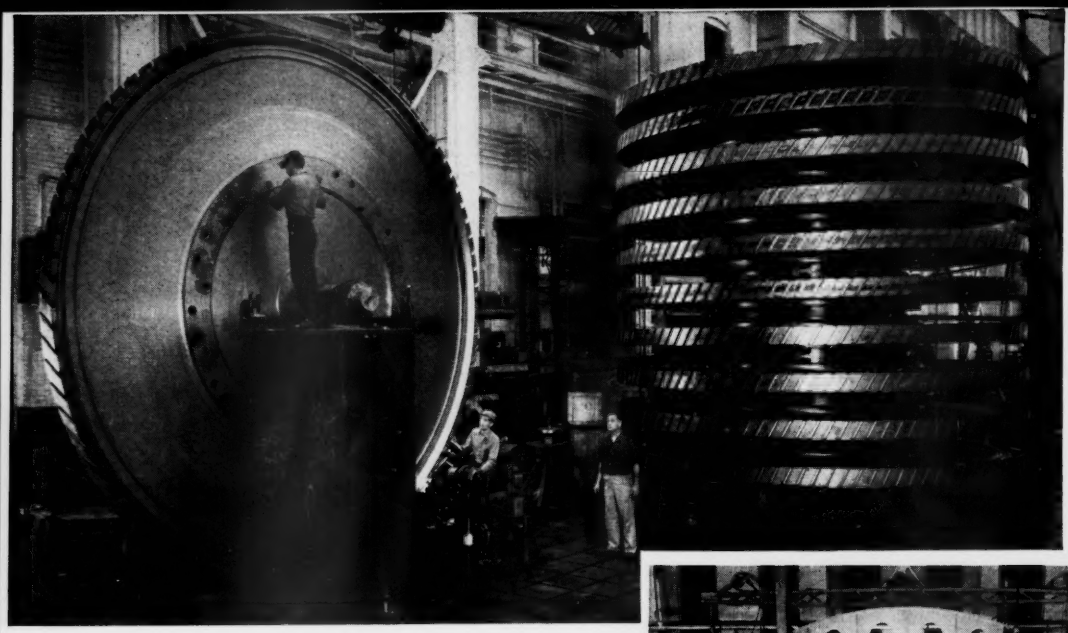
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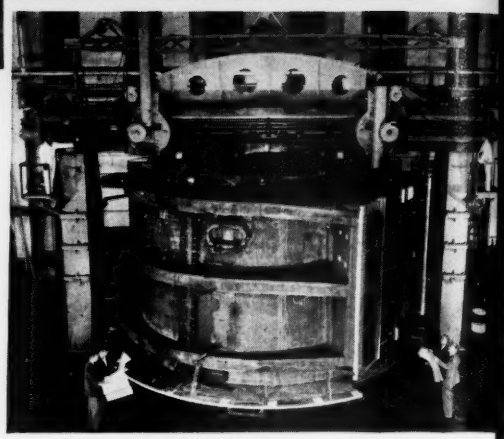


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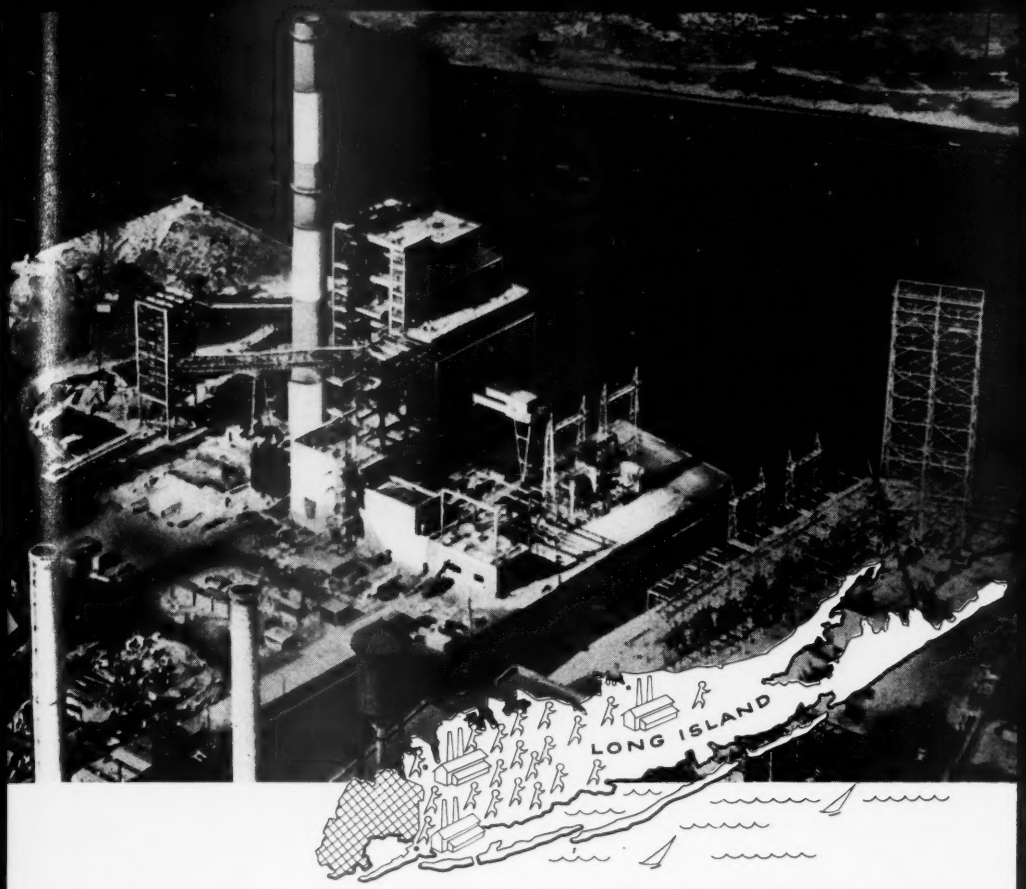
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For example, three of Long Island Lighting's new plants completed so far are the first in the Northeast to feature outdoor-type construction. The first one, at Port Jefferson, incorporated semi-outdoor boiler. In subsequent units at Glenwood and Far Rockaway (the latter is pictured above), the degree of "outdoorness" was advanced further—with only the front ends of the boilers enclosed and with the turbines completely exposed, eliminating all building structure above the turbine deck level.

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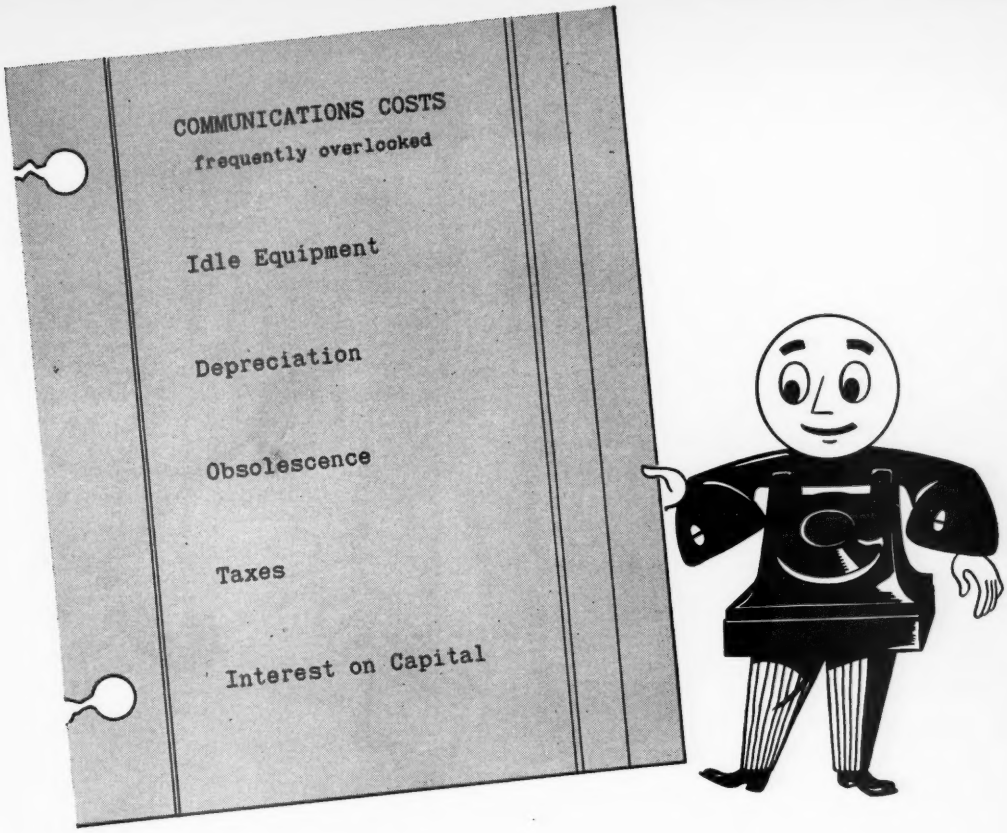
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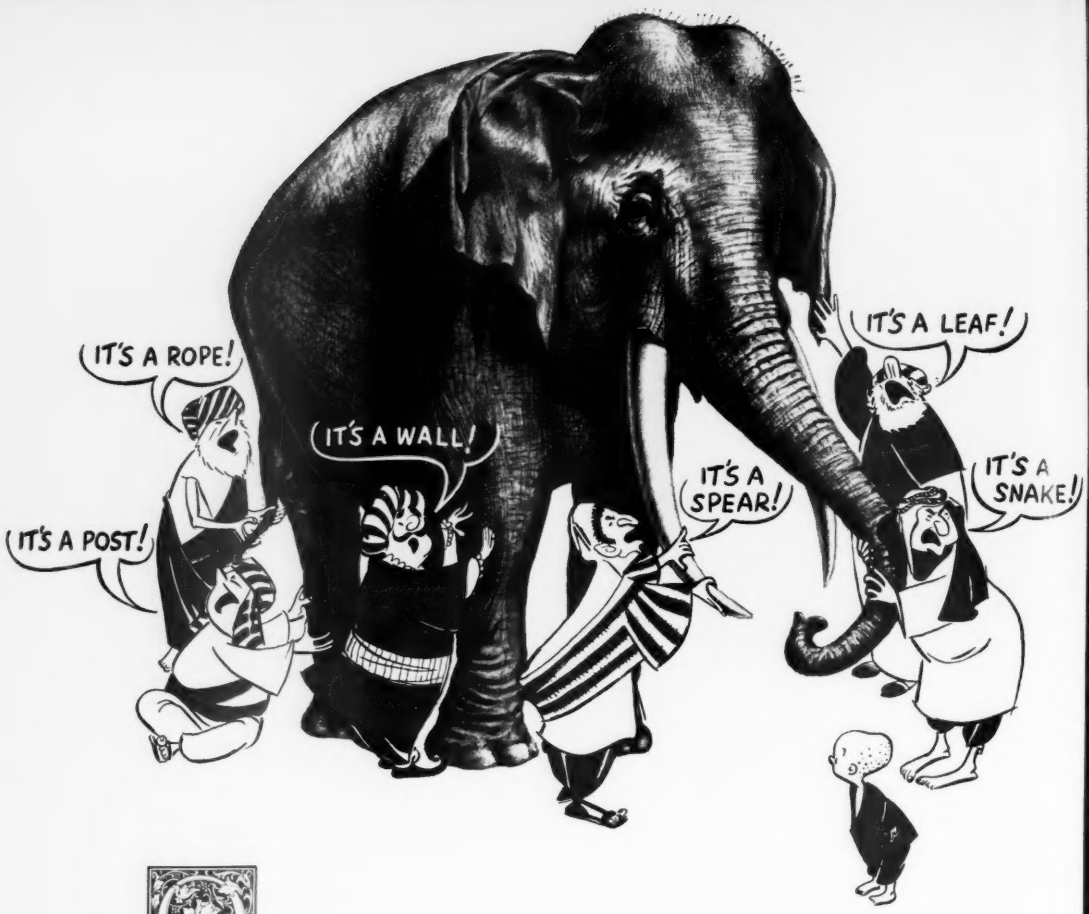

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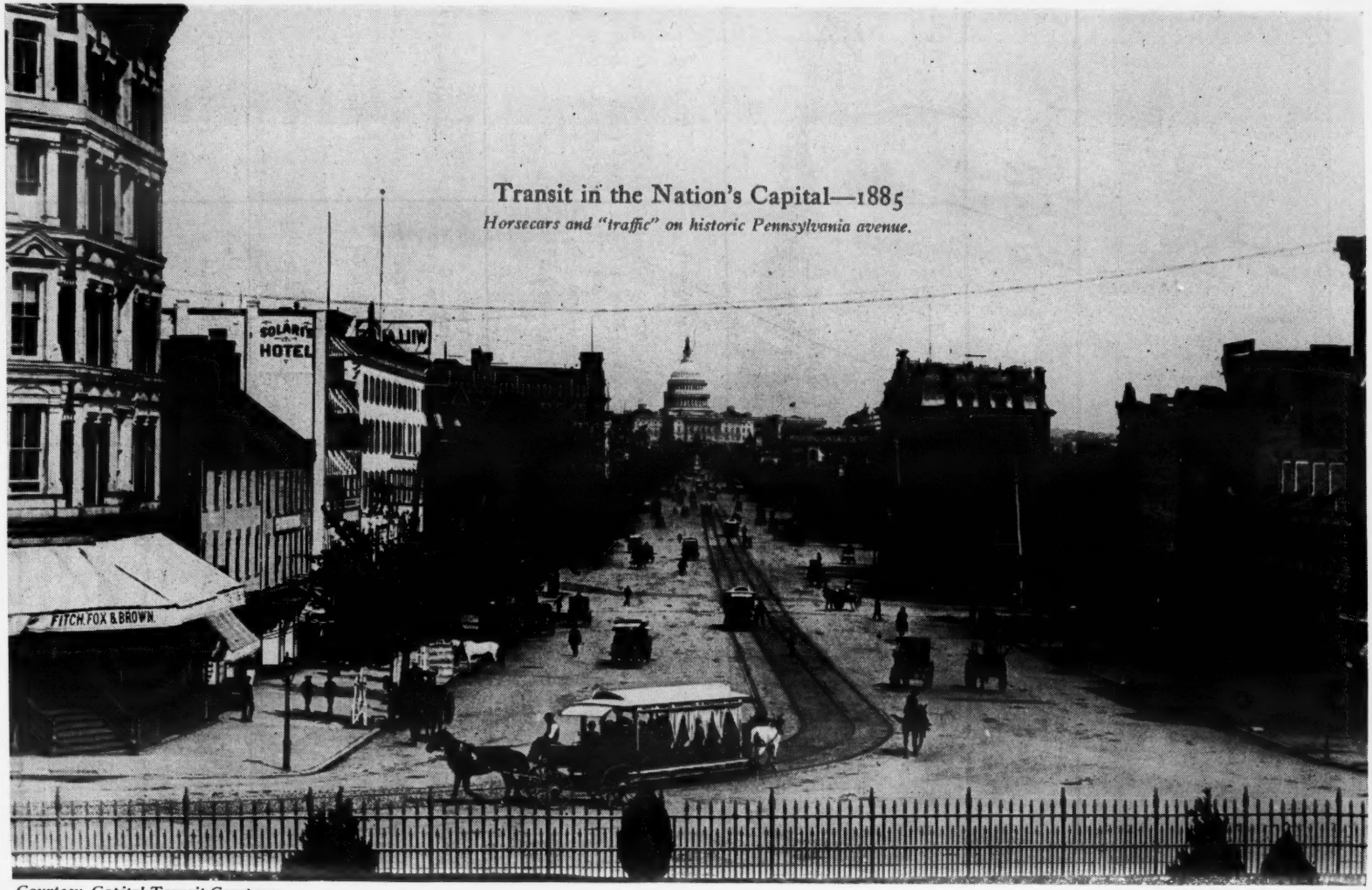
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SEPTEMBER-OCTOBER

Thursday—30 *American Transit Association ends 4-day annual meeting, Pittsburgh, Pa.*	**October** **Friday—1** *Southern Gas Association begins transmission accounting conference, Houston, Tex.*	**Saturday—2** *International Association of Electrical Leagues ends annual conference, Philadelphia, Pa.*	**Sunday—3** *New England Water Works Association begins meeting, Poland Springs, Me.*
Monday—4 *National Electronics Conference begins, Chicago, Ill.*	**Tuesday—5** *American Institute of Electrical Engineers begins middle eastern district meeting, Reading, Pa.*	**Wednesday—6** *American Water Works Association, Minnesota Section, begins meeting, St. Paul, Minn.*	**Thursday—7** *Edison Electric Institute begins area development workshop, Cleveland, Ohio.*
Friday—8 *Indiana Electric Association ends 3-day annual convention, French Lick, Ind.*	**Saturday—9** *Alabama Broadcasters Association ends 2-day meeting, Tuscaloosa, Ala.*	**Sunday—10** *Controllers Institute of America begins annual meeting, Chicago, Ill.*	**Monday—11** *American Gas Association begins annual convention, Atlantic City, N. J.*
Tuesday—12 *Edison Electric Institute, Electrical Equipment Committee, begins meeting, Hartford, Conn.*	**Wednesday—13** *United States Independent Telephone Association ends 3-day national convention, Chicago, Ill.*	**Thursday—14** *Pennsylvania Electric Association, Relay Committee, begins fall meeting, Hagerstown, Md.*	**Friday—15** *West Virginia Oil and Natural Gas Association begins meeting, Jackson's Mill, W. Va.*



Transit in the Nation's Capital—1885

Horsecars and "traffic" on historic Pennsylvania avenue.

Courtesy, Capital Transit Company

Public Utilities
FORTNIGHTLY

VOL. 54, No. 7 SEPTEMBER 30, 1954

What's Happening to Transit?

The past twelve months have been referred to by some transit service operators as "the year of the great awakening." It has been a year when the transit industry has placed its cards squarely on the table with the public.

BY LAURENCE WINGERTER*

OPERATING revenues in the transit industry are at an all-time high. So are labor and other costs. Passenger traffic continues to decline. However, the statistics do not tell the full story. They fail to reflect the important, long-range progress the industry has made toward nailing down the essentiality of public transportation in America's cities and towns. It is most heartening to report the growth of a resolute spirit within the industry to win for public transportation its rightful rôle in the growth and development of the nation's urban areas.

*President, American Transit Association. For additional personal note, see "Pages with the Editors."

Some have called this new forthrightness, this new aggressiveness in approach, a kind of a revolution. One transit operator publicly calls this "The Year of the Great Awakening."

Transit today is "talking turkey." It is laying its cards squarely on the table with the public—the ultimate judge under our democratic system.

Caught in the squeeze between declining patronage—due to greater automobile use—and mounting operating costs, transit companies are insisting:

> There must be an end—and soon—to the vicious cycle of wage raises—fare increases—service curtailments, for

Courtesy, Capital Transit Company

everybody suffers as these futile processes go on and on.

Traffic congestion must be alleviated by courageous official action, and transit must be accorded its rightful place as the most efficient and satisfactory mover of people on the city's streets.

It is the city's duty to provide a climate in which transit and the private automobile can both exist and prosper.

It is the city's duty—and to the city's interest, economywise—to strike a better and fairer balance—and a less costly one—between the use of so much tax money to move and park vehicles and so little to move people.

Transit should be accorded greater freedom and opportunity to manage itself. This can be achieved by bringing the regulatory processes abreast of our times and by official recognition of the fact that transit is no longer a monopoly.

Franchise, gross receipts, and other special taxes dating back to horsecar thinking must be sharply cut or removed entirely.

CIVIC and business leaders in many communities have come to realize that transit, because of traffic congestion and other conditions beyond its control, is being forced to offer a less attractive service at an ever-increasing price. They recognize the futility of investing staggering amounts of money in facilities for moving and parking private automobiles, especially as these facilities merely add to the congestion in the downtown areas. As an alternative, they are advocating that in planning of such facilities for the future, emphasis should be given to the need for moving people rather than vehicles. And that means more emphasis on transit. It may even mean providing private rights of way at public expense for transit vehicles, so that transit service may be speedier than the private auto.

Some cities, realizing that it just is not possible to provide parking space for everyone who gets a notion to jump into his car and drive downtown, are already adopting the practice of establishing parking lots away from the central area, with public transit providing shuttle service from these lots to downtown and return.

In other cities, express transit routes have become established and well-accepted practice. Frequently, such routes operate over freeways, with special turnouts for bus stops built into the freeways as part of the over-all design. Riders generally indicate a preference for this speedier, more convenient service and are willing to pay a premium fare for it.

MANY cities are adopting "get tough" policies in their efforts to break up traffic jams. Philadelphia has banned parking altogether to an extent of 12 square blocks in its central area. Some communities are setting aside the curb lane for exclusive use of busses in an effort to speed up the movement of people. Others are getting increasingly strict in enforcement of parking regulations and in forbidding turns at intersections.

The previous all-out zeal for expressways and freeways designed to be used exclusively by the private automobile is being tempered in some places these days. Planners, merchants, and city officials are coming to realize that these costly structures not only do not alleviate traffic congestion, but actually invite more cars into the downtown district. And, unless the city is prepared to handle the additional traffic,

chaos ensues. Similarly, many cities are exercising greater care right now in the matter of locating parking lots and garages. Bitter experience has taught that jams are created by motorists getting into and out of these parking places, and that it is better not to have them right in the middle of the city's principal business activities.

There are many additional evidences of public recognition of the essentiality of transit and the universality of its impact on the whole urban structure. The public utterances of some officials are worthy of note.

T. T. WILEY, commissioner of traffic for New York city, recently put it this way: "Formerly there was a field of thought that our city should be developed so that everybody could get to-and-fro in an automobile and do what they pleased with it. It is now becoming apparent—as it should have been some time ago—that we cannot have a metropolitan area based upon the automobile as its primary source of transportation."

Some pertinent discussion of problems confronting the transit industry and regulatory agencies was set forth earlier this year by the public utilities commission of the District of Columbia. In its order authorizing an increase in transit fares the commission made these statements:

> If a majority of the public desert mass transportation, and use private passenger cars for their daily city travel, they at the same time deprive private ownership of necessary operating revenues and substantially increase the cost of mass transportation by congesting the streets and slowing down traffic. Continuation of this pattern could eventually defeat private ownership. Under less efficient public operation, presumably no taxes would be paid by the company, either local or federal, and reasonable transportation fares would probably be maintained by the general increase of taxes to users and nonusers alike. Thus the problem of mass transportation is of moment to every taxpayer in the community. This commission has a duty to maintain, and will require, adequate services to meet demand. The situation can be rapidly alleviated, and fares even reduced, if the public will co-operate by making a reasonable use of mass transportation facilities. We are cognizant of the bleakness of the outlook for a company and an industry whose patronage declines steadily year after year, with an emphatic acceleration after every fare increase. The transit service is the only public utility which does not impose a stand-by charge, payable alike by all potential patrons making any degree of use of the services. The problem of transit revenues would be simple indeed if there were a method to realize stand-by charges in recognition of mass trans-

¶ "IT *is most heartening to report the growth of a resolute spirit within the industry to win for public transportation its rightful rôle in the growth and development of the nation's urban areas. Some have called this new forthrightness, this new aggressiveness in approach, a kind of a revolution.*"

portation's readiness to serve. This is a real problem in the industry; and this commission concludes that it should have realistic treatment.

THE commission went so far as to consider the time-consuming effects of fares requiring "the deposit of four or five coins in the fare box, preceded by either a search for this batch of coins or a change-making operation in which the motorman or bus driver usually hands the passenger eight coins in exchange for a quarter." Such fares (17 cents or 18 cents) delay the transit service, the commission held, and a 19-cent fare "would be intolerable," it decided in setting the cash fare at 20 cents in combination with reduced token rates. The decision was prompted by "the practical aspects of this problem" and a "definite conclusion that the best interests of this community will be served" by the new fare structure.

Additional support for the transit industry's position came recently in a book written by Hal Burton. Titled *The City Fights Back,* the book was written by Mr. Burton under auspices of the Urban Land Institute, a nonprofit organization which has been providing impartial advice to cities on many matters besides transportation and traffic since before World War II. After traveling 50,000 coast-to-coast miles and interviewing more than 1,000 business and civic leaders, Mr. Burton calls public transit the most valuable gem in the city's collection and urges strongly that the special taxes peculiar to the industry be removed or reduced in order to keep privately owned transit companies solvent and insure survival of downtown districts.

American cities, says Mr. Burton, "beset by the loud and insistent cries of the motorist, a potent figure in urban life, have been searching frantically for remedies which will make it easier for the man with a car to drive downtown and then park. This, while laudable, is only part of the solution to a nagging city problem—making it possible for people to get in and out of the central business district. Obscured by rows of cars backed up at the traffic light, downtown's most gleaming diamond has gone unnoticed in the streets. This diamond is mass transportation—the bus, the streetcar, the elevated, and the subway, which in the larger cities transport as many as 60 to 80 per cent of the working population.

"The cities have not only neglected the gem: They have, with few exceptions, kicked it around the streets like an empty trash can. Mass transportation has become a convenient political symbol, low fares have become a fetish, and high taxes a commonplace, based on the convenient but outmoded notion of the politicians that privately owned transit lines are a monopoly and should pay dearly for the privilege. This ignores the fact that mass transportation is a necessity. Without it, any city of size would wither away."

IN two states—New York and Wisconsin—the governors have appointed special commissions to study transit problems in cities and towns and to make recommendations to the legislatures. In a recent speech before the New York Conference of Mayors, Wade Stevenson of Buffalo, a member of Governor Thomas E. Dewey's committee, said of public transportation that it "is still indispensable in our American way of life, and its loss would cause the highly integrated economic machine of urban communities to grind inevitably to



Survival of the Transit Industry

"By continued good management, by prudent use of man power and materials, and by working co-operatively with public officials in a joint endeavor to solve the traffic problem through improving the speed and attractiveness of public transportation service, the transit industry will continue to survive and to serve America."

a slow walk." Mr. Stevenson said it was

> . . . the considered judgment of the committee that fair and equitable treatment of the transit industry, as well as a realistic desire to preserve a valuable source of revenue, require that both the state of New York and its municipalities take a thorough and impartial new look at the impact of the present tax structure upon the privately owned bus industry. There is danger otherwise—real danger—that they may kill the goose that lays the golden egg. The problems facing the industry are so complex that they cannot be solved by any single formula. Because of the complexity of government, its contacts with the industry at different levels, and the important rôle played in the situation by local government, there is no single level of government which presently exercises sufficient control to effect a solution.

At public hearings in Madison and Milwaukee, the statewide committee appointed by Governor Walter Kohler heard testimony of transit operators, city and town officials, and business and civic leaders.

At one of the state committee hearings, Mayor Frank Zeidler of Milwaukee declared "The auto does not pay its way because cities must spend large sums of money for new streets, expressways, and off-street parking to accommodate it."

This point was emphasized at hearings conducted later by a special committee which Mayor Zeidler appointed to study Milwaukee's transit problem. Witnesses reported that there is a considerable gap —not in the city's favor—between what the city spends and what it gets in revenues from street and highway users. One report received by the committee indicated that the city spent $25,205,908 building and

maintaining streets and highways last year. Against that, its revenues from motor vehicles in taxes and fees were $6,098,235, leaving a deficit of $19,107,673. According to the city comptroller's office, which drew the report, the city of Milwaukee received only $28.72 for each of the 212,316 motor vehicles registered from the city. Street costs per automobile, however, were $118.72, so the city paid out $90 more per vehicle than it took in.

WHILE the transit industry is making great progress toward establishing its essentiality, its success is not yet reflected in current profit-and-loss figures and passenger traffic statistics. During 1953, transit traffic in the U. S. declined 8.05 per cent below the 1952 level, but higher fares produced an increase in total operating revenues of 0.77 per cent. Total operating expenses increased 0.08 per cent. Revenue vehicle miles decreased 4.23 per cent, and the average number of employees was reduced 3.08 per cent. Payroll costs increased 1.11 per cent.

Net operating income before income deductions and federal income and excess profits taxes showed an increase of 24.50 per cent and will yield a return on gross investment of 1.63 per cent. However, if the results of operations of the seven largest publicly owned transit systems in the U. S. are excluded, a return on gross investment of 4.80 per cent is indicated for the balance of the industry.

This rate of return is nowhere near enough to compensate for the risks entailed in operating a transit system today. It is gratifying to report, however, that of 165 privately owned companies which have made their financial statements available to the American Transit Association, 104 reported some net income for 1953. In the cases of 61 of these companies, net income for 1953 exceeded that of the previous year.

The decline in passenger traffic is continuing in 1954. For the first six months, the decline was 11.10 per cent below the same period in 1953. Thus, the industry is left with no alternative but to continue to impress upon the public these facts:

> That no company, in the long run, can continue to provide adequate service unless it has satisfactory earnings.
>
> That passengers virtually write their own schedules—the more they use the service, the more frequent it becomes.
>
> That special privilege taxes on transit operations and transit riders must be eliminated.
>
> That the downtown areas of our cities can be preserved only through civic cooperation toward improved transit service.

AT what point in the transit and traffic congestion situation the pendulum will swing back and the downward trend in transit riding will be reversed, I do not know. That it will swing back, I am sure.

By continued good management, by prudent use of man power and materials, and by working co-operatively with public officials in a joint endeavor to solve the traffic problem through improving the speed and attractiveness of public transportation service, the transit industry will continue to survive and to serve America.



A Businesslike Cure for Rush-hour Cramps

This article stems from an "off-the-cuff" interview with operators of privately owned off-street parking facilities. The purpose is to determine the prevailing view on the ability of private enterprise to handle the parking of private automobiles with the incidental benefit of increased efficiency and more economical transit operation.

By GEORGE W. KEITH*

A previous article, "Traffic Crisis," asked "Is Subsidized Parking the Answer?"[1] Various interests replied that it is not; neither is the parking authority wholly acceptable.

Too many, the billion-dollar independent parking industry declared, believe municipal parking will solve urban traffic riddles, seizing upon the two bugaboos—"The Great Parking Problem" and "Decentralization"—as their justification for government intervention.

The National Parking Association claims both problems have been artificially built up and are highly mythical, containing but a grain of fact, and identified solely with the vocabulary of the fainthearted.

NPA members simply refuse to be rushed into opening new, and possibly little-needed, parking places unless, like the merchant who contemplates a new wing on his building, they can be shown, without reasonable doubt, that the necessity exists, and to what extent.

It also disclaims any responsibility whatsoever for having created either dilemma, and acknowledges its own inability alone to solve either one. And positively denies that government parking can.

Cautiously, they day by day erect new plants, while suggesting co-operation among all elements of our prosperity; mer-

*Professional writer, resident in Cincinnati, Ohio. For additional personal note, see "Pages with the Editors."

[1] Public Utilities Fortnightly, April 24, 1954, page 533.

chants concerned should build parking for their own customers, when possible.

Too much unwarranted traffic in the core, and greater use of mass transportation, the association and various other authorities assert, should be the first order of business in seeking a reason for what ails our cities.

THE present article lists several examples (among many) of city, business, and the parking industry working together, without fear of the first two gobbling the third.

Supplementing these is a proposal by a prominent transit official which, if adopted generally, might go a long way toward cracking the crisis.

Of all places! Washington, D. C., offers exemplary government-business unbossed parking, rendering affirmative response to the cynical average businessman's scriptural paraphrase, "Can anything good come out of Washington?" Hear a U. S. Chamber of Commerce expert: That city, Henry Evans asserts,

> . . . through its Motor Vehicle Parking Agency, has outstripped all other cities in growth of parking, with most of the credit going to the agency. Private enterprise has come up with a net addition of 20,500 parking spaces—the equivalent of a new 330-car garage every six weeks, during the entire period.
>
> Operating on a budget of only $20,000 a year, which comes from meter revenues, this agency has given personal and direct aid to investors of private capital in parking, often tracking down rumors, or "tips," to get to prospective builders before their plans are crystallized.
>
> The purpose of this is to help shape future developments around the primary parking need of the District . . . and to assist the owner in providing the most efficient and productive parking facilities. For instance, the agency showed one builder how his architect had provided floor space for the proper number of cars, but had so placed the supporting columns that cars could not get into and out of the stalls.
>
> The public-private co-operative plan has helped operators like Arthur Dezendorf to prosper. In addition to . . . Park-O-Mat, the country's only fully automatic parking garage, his firm owns, or leases, and operates 16 lots, and five garages . . . an aggregate investment of $10,000,000. (What a plum for the thumb of Jack Muni-parker to ruin the pie!)

CHARLES T. MCGAVIN was the executive director, whose honesty of purpose and keen insight, according to *Parking* magazine made the District a model, "because the growth of off-street parking there came from a city government policy of assisting and encouraging private enterprise, rather than subjugating it by threats of subsidized competition—one of the principal concerns of NPA."

But the thing was too good to be true, for just when McGavin had about established "assisting rather than harassment," with himself "the leading champion of that policy," a few District officials weakened under pressure from promuni-parking pressure groups, and McGavin resigned.

His highly publicized blast against the officials was coincident with NPA's making him its executive director.

He had come to Washington in 1939 on

invitation, to study parking, and in 1946 became head of the agency, and had successfully withstood *bureaucritis.* Instead he vigorously championed "the philosophy that the parking industry, a young and growing business, needed a helping hand and encouragement to develop and supply the needs in its field . . . if a city directed its efforts along that line, its accomplishments would be far superior to municipal intervention, subsidy, or any other use of public funds."

TRAVELING at his own expense, he had visited 44 cities across the nation, drawing on his twenty-six years as an engineer, twelve of which were spent in all phases of parking operation and management.

He had studied the mewling infant, decentralization, as early as 1931, and now his tour convinced him the plan he put into effect at Washington was one of the best answers to parking to be found anywhere, and unequaled in any city.

Washington could not resist ignoring this rich experience and attempting replacing it with dream effusions, and deep dips into District dollars.

Hence NPA suspicion of the "authority," and its prompt adoption of McGavin as the "father of co-operation, and enemy of domination by government."

There are 17 cities with authorities, working more or less independent of the city government, and usually tax free, Evans says. They acquire land, borrow money, build parking garages, but cannot tax or borrow money on community credit; but they can create havoc for private investors, as in Chicago.

Attorney Joseph Berger, in the 1930's leased, for a client, a dilapidated Loop building site, after extensive study, and guaranteed the owner 3¾ per cent on his $1,300,000 investment.

A modern parking garage, with restaurant and other stores on the sidewalk level, replaced the obsolete structure.

Recently a new 30-year lease, with higher interest, enabled enlargement to a 425-car capacity operation, a structural investment of $500,000.

THEN the city of Chicago proposed to own and operate six multilevel garages in the Loop, with 4,960 spaces, and eight lots in other parts of the city; a $50,000,000 ordinance authorized these for 1954 completion.

Its Park district, too, is building "the world's largest and costliest parking garage" under Grant Park, at the Loop's edge—$8,300,000 for 2,359 spaces, with a second 1,652-space cave south of the other.

¶ "LESS *than fifty years ago hogs, driven through city streets, caused more teamster profanity than could any modern traffic jam, but swearing did nothing to stop the nuisance. Cities had to act decisively, while stock drovers lamented they would be 'ruined, etc.'. . . . Cussing will do no good now, either. Cities must not display 'timidity to regulate and control' the situation, but act for the great silent numbers, heeding not the loud few.*"

Berger, now president of Chicago Parking Association, and his conferees, withdrew in futility from further private ventures. Berger comments sadly:

> I pay $77,000 a year in taxes on just one of my garages, plus $1,000 license fees, and a rental of nearly 6 per cent of the land value I occupy.
>
> Yet, the new underground garage competing directly with me, paying no taxes, no license, and no rent will, according to the financial prospectus, charge the same rates as I do. The argument for publicly owned parking on the basis of lower parking fees, does not seem so realistic in practice.

George E. Sokolsky, in his syndicated Column appearing in the Cincinnati *Times-Star,* mentions "municipally maintained garages, sensibly located and operating at reasonable fees . . . being accomplished in some cities by locating garages underneath the sod of parks. It is a practical plan," he concluded. Practical, possibly, but hardly fair.

Practicality does not imply justice, and the thought does not do this ardent advocate of individual and private enterprise credit.

He would probably be the first to spring to his keyboard to denounce Chicago taking over the White Sox, overlooking the fact that municipal officials have no magic formula not possessed by mere humans, and that unfair competition is as ill-smellingly repulsive no matter under what banner it is encountered.

If the Grant Park diggings are necessary, and there is plenty of doubt as to their efficacy to scotch the traffic snake, there would be sufficient private funds forthcoming to finance the project; but venture money is frightened away by the dreamers.

San Francisco went underground with its Union Square garage, after four years and a court decision authorizing it at a cost of $1,550,000; RFC loaned $850,000 and the public bought the rest in 6 per cent stock, later changed to 25-year debentures.

Under an operator-management contract, with 130 employees, 3,000 cars use the 1,700-car facilities daily. It costs about $180,000 a year, including $25,000 rental and tax, to operate this deluxe affair.

The RFC loan keeps it from being a private operation, and corporation officials believe, now, the loan was a mistake; and NPA frowns upon even such government subsidies.

However, far from solving any traffic crisis, this garage only drew more cars into the core, and two more undergrounds are being planned under other public squares.

Thus Chicago and San Francisco have spent much time and money, but their aggregate parking capacities do not begin to approximate their actual requirements, if traffic is allowed to run rampant in these respective loops.

Both cities are building more plants, which will in turn attract more traffic, calling for more garages, and so on, *ad infinitum!*

Minneapolis offers a pleasing contrast to government-owned or -manipulated plans, in the fact that its chamber of commerce and building owners and managers summarily rejected two muni-parking suggestions, but adopted, just as unanimously, private operation.

This was financed, 75 per cent by bonds,



The Rights and Responsibilities of Auto Drivers

"ABETTED by such organizations as the American Automobile Clubs, Automotive Safety Foundation, and National Highway Users Conference, outfits interested in highway transportation, auto makers, suppliers, truck and bus companies, farm organizations, highway constructors, etc., implying passively, often actively, that autos have imperative and paramount rights above all other interests, drivers often assume a hauteur that entirely ignores the fact that these other interests, collectively, make the automobile possible; a deplorable son-disowns-father condition, unhealthy in civic affairs as much as it is in family relations."

and the rest by sale of stock, which was subscribed to by business interests, retailers, banks, building owners and managers, hotels, saving and loan associations, newspapers, and the general public, to the tune of a million dollars.

Within thirteen months two garages were going, providing 1,354 spaces in the heart of the retail center, providing, too, efficient, polite, swift service, even in rush hours. These are already making a little money for their owners. Officers and directors serve without pay.

Encouraged by city and parking interests, some banks and other establishments, "sold on the advantages of encouraging private enterprise to provide necessary off-street parking in the Loop," are erecting their own parking.

ANOTHER example is that of Bill Gill, Jr., of Oklahoma City, who organized a 5-man committee of downtown businessmen, which, after shaking its head over on-street parking, first arranged for nickel shuttle service from fringe park-

ing lots to the core area; which is putting first principles first.

The city traffic control office co-operated by issuing a portfolio, which showed parking and traffic data, along with suggestions for good sites, and cost of building lot or garage estimates.

Also, Gill's men persuaded the city to have engineers lay out a future parking plan, supplementing this with a huge pictorial display, with four spots marked as badly in need of parking facilities, and stressing the importance of the project.

Thus, private industry, tongue-in-groove with friendly officialdom, in three years built three garages, with nine lots, to provide 2,350 additional car spaces; which so delighted a group of merchants that they organized their own "Merchants Parking System," got a 10-year lease, and converted a property into a 500-car public lot.

Then there is Allentown, Pennsylvania, possibly the widest-copied community as regards parking, through its Park-and-Shop plan, a corporation of 100, or more, businessmen, sparked by Donald Miller, newspaper executive.

The plan operates 10 lots, some owned, some leased, within an 800-foot radius of the central shopping street, and two ramp garages, giving in five years, more than 1,000 more car spaces downtown.

MILLER claims the parking problem is solved, and no large suburban shopping centers have developed to "siphon off downtown trade"; retail sales, he claims, which were $99,000,000 in 1945, have almost doubled, and the plan sponsors cut themselves a dollar dividend last December.

Parking fees are refunded to shoppers, *but most important was the city's prohibition of parking on the main street, which expanded traffic movement, and also expanded off-street parking.*

Serving to illustrate that co-operation by municipalities is absolutely necessary to the success of any plan, as it has done at Baltimore.

There the muni-parking agency assists private operators, while Buffalo encourages private management by exempting parking garages from any taxes on the buildings, for fifteen years, if at least 150 cars can be accommodated, and pro rata for partial parking buildings.

However, NPA does not smile on this, contending that subsidies of any kind are un-American, and often provide wedges by which subsidizers can bend the subsidized to their wills.

At Wilmington, Delaware, 38 merchants formed Shoppers Parking, Inc., and erected a 187-car shopping facility; likewise in Chattanooga, three enterprising merchants financed an improvement to a hill-side, two-level property, which now serves their customers adequately, at a profit to its sponsors, and to the great improvement in conditions in the area, according to John Hendon, Birmingham parking veteran.

Pioneering Oakland, California, merchants in 1929 formed their own parking business, and today operate six stations, "conveniently scattered at intervals in the shopping district," and forestalling an authority, sanctioned by law.

PARKING free for the first hour, holders of coupons stamped by any of nearly 175 merchants, pay 15 cents an hour after that. Sunday and holiday charge is 35 cents an hour, flat.

Merchant members, comprising over 60 per cent of downtown business, share pro rata expenses and profits, which were $16,000 last year, after taxes. Engendered good will cannot be measured, they say.

A chamber of commerce sponsored idea at St. Louis has made "great strides," according to Charles G. Gonter, traffic commissioner. One-way streets, rerouting transit lines, barring traffic in rush hours, enables the St. Louis Transit System to reduce running time a mile a minute, it is asserted. Motorists reported comparable time savings, and traffic mortalities dropped when the plan was started in April, 1953.

The transit system uses a park-and-ride, 35 cents a round trip, between a west-side parking lot and the core area.

Incidentally, Edwin C. Clark, president of Southwestern Bell Telephone, received the coveted St. Louis Award for distinguished public service, for his leadership in the traffic plan's fruition.

Without detracting one iota from the fine record of co-operative accomplishment, a foot-note must be added.

Recently a light snow snarled traffic so badly, that the *Post Dispatch* was constrained to say it "made the city look ridiculous" and "We believe most citizens will agree the main highways and streets are not big enough to hold the traffic."

WHICH is exactly the contention of the NPA, which points out that St. Louis is one of the latest big cities to join Philadelphia, Los Angeles, and others that have adopted restricted parking in large, previously highly congested areas, with excellent results.

But there is continued hedging in most smaller, big cities, where officials fear to offend autoists, and "ruin" downtown merchants.

Morris Edwards, then president of Cincinnati Transit Company (now head of Gruen Watch), noted this impasse as he spoke to Canadian and U. S. mayors, in conference recently at Montreal. He said:

> The spectacle now before us of great cities suffering themselves to be well-nigh paralyzed, not by the automobile, *but by timidity to regulate and control the time, place, and extent of use of an unmanageably large number of automobiles,* is, when all is said and done, a phenomenon which is anything but complimentary to our intelligence, to our capacity to order our own affairs, and to our ability to perceive what constitutes the greatest good of the greatest number, and then take resolute steps to secure and safeguard it.

With our vast experience in similar

¶ "THE *National Parking Association claims both problems [parking and decentralization] have been artificially built up and are highly mythical, containing but a grain of fact, and identified solely with the vocabulary of the fainthearted. NPA members simply refuse to be rushed into opening new, and possibly little-needed, parking places unless, like the merchant who contemplates a new wing on his building, they can be shown, without reasonable doubt, that the necessity exists . . .*"

vein, he said, traffic congestion need not challenge the orderly processes of law. An individual's rights to do, or use something, he reminded, are limited to the extent that they coincide with the rights of all citizens, adding that there has been "compelling public sanction" approving this doctrine.

"THERE is no fundamental reason," Edwards continued, "why the right to use, or store automobiles in congested areas in rush hours should not be progressively limited . . . as necessities . . . demand, just as similar limitations of the right to carry and use firearms, or keep livestock in city areas, or to dump sewage into city gutters, or ditches, have been solved."

The public could be educated to "the need for the restriction and the rightness of the timing," if such a program were started about a month before Christmas, for instance, he intimated.

When "the thinking and approaches" on the part of all concerned rightfully, "begin to develop momentum in the directions suggested . . . we, in the transit industry respectfully submit there will be official and general public acceptance . . . effective action, rather than lip service, of a thesis . . . which we think, becomes the more clearly proved with each passing day."

No other interested party than transit has a more vital stake in bringing traffic congestion into proper focus, with "sensible remedies energetically applied," he asserted.

Transit last year, he said, served about 100,000,000 people with 16 billion rides, 160 per person, for approximately two-thirds of our continental population.

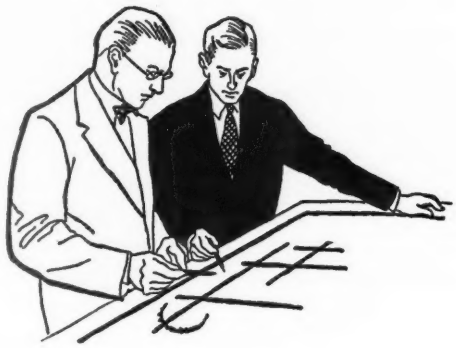
Should not these 100,000,000 have a lobby, a friend in the temples of justice, when some 50,000,000-odd autos possess the most puzzlingly powerful, headless "lobby" extant?

WHAT other group, or groups can cause valuable buildings to be razed, streets to be widened, boulevards created, while exercising mesmeric influence on otherwise impervious tycoons to heed their demands for socialistic government intervention, and confiscation of legitimate business?

Abetted by such organizations as the American Automobile Clubs, Automotive Safety Foundation, and National Highway Users Conference, outfits interested in highway transportation, auto makers, suppliers, truck and bus companies, farm organizations, highway constructors, etc., implying passively, often actively, that autos have imperative and paramount rights above all other interests, drivers often assume a hauteur that entirely ignores the fact that these other interests, collectively, make the automobile possible; a deplorable son-disowns-father condition, unhealthy in civic affairs as much as it is in family relations.

These organizations, united behind the 100,000,000 transit riders, could help crack the congestion they deplore, making the auto truly "the wonderful device for free, individual movement and swift, personal transportation," Edwards considers it.

But the 50,000,000 autos constantly delay the 100,000,000 in their desire to get some place, souring the mass riders, adding to the private conveyances, and pyramiding the pandemonium. Net results: fewer bus riders—plus more private, equals more delay, plus 10 per cent added transit costs, equals another fare raise,



Vicious Circle of Downtown Parking

". . . Chicago and San Francisco have spent much time and money, but their aggregate parking capacities do not begin to approximate their actual requirements, if traffic is allowed to run rampant in these respective loops. Both cities are building more plants, which will in turn attract more traffic, calling for more garages, and so on, AD INFINITUM*!"*

resulting in more private riders, etc., etc., etc.!

EDWARDS, noting the "rather astonishing array of major and minor suggestions" for alleviation, said that traffic control schemes, radial expressways, *increased off-street parking* cause more traffic to be attracted downtown. (Witness San Francisco, Chicago.)

One-way streets, better traffic control, are good, he said, but inadequate, and more off-street parking in the heart of congested areas "aggravates congestion unless correspondingly more on-street parking is eliminated." He thinks that complete prohibition of street parking and standing —with limiting stores' truck services to nadir hours, and uncompromising enforcement, towing away offending cars, stiff fines—have been more effective than all other measures.

STRIKE, Edwards recommends, on a widespread scale, at congestion at its source—the number of vehicles entering, requiring parking—by "providing very large 1,000- to 2,500-car parking lots on cheaper ground, well beyond the edges of the congested area, and served by frequent buses to the core area, on a bargain-fare basis."

To this writer this is the only workable scheme for built-up cities; Edwards acknowledges support by civic and business elements is needed for its success, as is being done at Oklahoma City, you will recall, by private, not municipal operators,

and on a partial scale only. It needs universal acceptance and city-wide operation, not just one lot, but lots at every approach to the center of towns.

"Some rather imaginative suggestions," Edwards told the assembled mayors, "that access to central business districts be denied, at least at rush hours, to all vehicles other than police, fire, ambulance, transit . . . vehicles of emergency nature, or certain main streets be reserved at rush hours for exclusive use by such high-priority vehicles, probably overreach today's necessities in all but the most critical areas in the very large cities." (See "Moving the Masses of Tomorrow," PUBLIC UTILITIES FORTNIGHTLY, March 27-April 10, 1952.)

THE executive said such measures would "certainly outrun the level of regulation for which public sanction could presently be developed," but he intimated the idea "will gain increasing attention and consideration in the not too far distant future, unless current trends towards steadily increasing density of traffic during rush hours . . . are arrested, and if possible reversed."

Less than fifty years ago hogs, driven through city streets, caused more teamster profanity than could any modern traffic jam, but swearing did nothing to stop the nuisance. Cities had to act decisively, while stock drovers lamented they would be "ruined, etc."

Cussing will do no good now, either. Cities must not display "timidity to regulate and control" the situation, but act for the great silent numbers, heeding not the loud few.

With that fortitude which made prominent business prominent, it must assert independence of government, except in those things which come within its legitimate purview; certainly auto-storage-warehousing is not one of these.

The "Golden Rule," it must be remembered is not using all the taxpayers "gold" to rule others' businesses so that our own may thrive.

With government and business, each functioning in its own proper, respective sphere, both reassuring venture capital the reasonable safety to be found in, let us say, the grocery business, there will be no lack of funds or ideas to solve congestion and parking difficulties in the accepted American way; and no need for any business to fight for its life, as the parking industry is doing today.

AS for cutting out downtown parking, and permitting only certain business, emergency, and mass transportation vehicles in the areas, these are coming, sooner or later.

We should make up our minds as to that NOW!

Anticipate it! Do not fight it! Meet it head-on, and preserve, do not tear down our fine cities, so emblematic of Yankee enterprise, which recognizes no Mason and Dixon Line.

Welcome suburban developments as natural, necessary, and as splendid tributes to the core cities, without which there would be no suburbs!



National Aspects of Transit's Public Relations

The economic problems of the transit industry since the end of the war have spread confusion and misunderstanding about those who are still trying to operate on the traditional basis of free enterprise in public service. Inexperienced people have been attracted by mythical opportunities for quick turnover and private gain.

By JOHN J. HASSETT*

In the course of nearly a decade of steady and gainful employment in the field of communications, much of it in the utilities area, I have found no individual more consistently misunderstood than the official of the average urban transit company. In the postwar period, he and his utility have constantly been harassed by rising costs and slipping revenues. He has frequently made appearances before civic groups, public bodies, and regulating commissions, to explain his company's difficulties and fiscal needs, and he has usually been required to defend against attacks from public-spirited groups, which often seem to have little purpose other than to take dead aim at suffering utilities.

Very often, the transit official chosen to mount the rostrum has been articulate and charming, personable, and forceful. But neither he nor his company has always been able to make more than a tiny dent in public resistance to their arguments.

The transit official is singular in this unfortunate position. Other utility men during the same period have faced and successfully explained inflationary difficulties. Other utilities have sought and won rate increases to compensate for higher costs. But in doing so, they somehow have escaped the stigma of public opprobrium which accompanies the transit official, wherever he tells his tale of transit woes.

*Washington, D. C., author of business articles and public relations counselor. For additional personal note, see "Pages with the Editors."

THERE are plenty of reasons for the different treatment, of course. Higher fares for the transit company have not meant better service or better equipment. It is difficult for people to understand why they should be expected to pay more for the same service or even poorer service. And when better equipment *has* been added, the frustrating traffic jams still bob up at the same intersections, slowing headways and defeating the carefully laid plan for more efficient operation.

The expansion of suburbs, a boon to telephone, electric, and gas companies, has proved more a bane to transit firms. They frequently have been required to extend existing service, or to add expensive shuttle lines, with little expectation that the new service ever will pay for itself. Almost inevitably, new suburban residents become annoyed at sparse, infrequent shuttle suburban service, having been "spoiled" by the abundance of busses and streetcars at their mid-town doors when they were city dwellers. As a result, many of them do not use the transit system at all if they can help it.

And that brings us to the main reason why transit companies and their representatives are misunderstood, and why their special problems are not recognized and appreciated. The family car has removed the transit company from the category of the true public utility—it is no longer a monopoly. As one traffic study recently made in Arkansas puts it ". . . more persons are encouraged to seek other means of travel—exclusively the automobile. Higher operating costs and fares thus drive persons from the most economic and efficient vehicle to the least economic and most inefficient means now in general use. This produces increasing demands from the public for the construction of more and wider highways, and pressure upon public authority for the installation of free or low-cost parking facilities in urban shopping centers."

THE application of tried-and-true remedies for utility ills just will not work in the case of transit companies, because a foreign element has been added—competition, and completely unregulated competition at that, from the private automobile.

Special problems pose the need for special remedies, and some suggested nostrums will be mentioned later. There is, however, a deeper misunderstanding of the transit business still to be explored. It is one that touches directly on operations, regulation, and finance, matters of vital importance to the industry.

It is no secret that the flow of investment capital into the transit industry in recent years has not exactly been torrential. Potential investors have been counseled that transit is a high labor cost industry, that efficient operation is hamstrung by municipal traffic difficulties which are usually beyond the company's control, and that revenues in terms of passenger miles have been declining steadily since the war.

Coupled with the obvious requirement that operations must be soundly engineered and sagely managed, it would appear that the industry is a poor one into which a neophyte entrepreneur should venture. Yet it is a fact that, due to misunderstanding, investors are tempted to take a flyer in this field.

Without operating know-how, or will to overcome these day-to-day stumbling blocks in the path of smooth opera-

tion, adventurous investors sometimes come a cropper.

HERE are some of the seeming blandishments in the transit picture that tempt them. Companies in some localities have managed to build substantial surpluses, laid aside perhaps for a program of conversion from rail to bus or for fleet modernization. Other companies have attractive real estate holdings, not directly or fully tied in with transit operations, which look like plums for the dividend seeker if they can be shaken out of the tree. Neither of these opportunistic shenanigans can be expected to help build service, and, in the long run, service is the only policy that management can adopt to assure steady earnings and future security.

Other investors are attracted by the theory that a change in management will somehow make things better for everyone. They think any feeling of ill will toward existing management will be dissipated if heads roll and new faces appear in their place. This theory, known in some public relations circles as the "fools rush in" technique, does not often succeed. Very soon after the turnover, the same old knotty, hard-core problems must be faced. Good intentions seldom solve them. In some cases, inexperienced hands only make the situation worse than before, and the anticipated housecleaning of top management may wind up with a clean sweep of the new investor's bank account.

THEN there are the would-be investors and managers who seek to pick up the choice pieces of an integrated transit system threatened with collapse. They spot certain lines that seem to be producing good revenues, and offer to operate them independently. Perhaps they may even convince a public service commission that they should be granted a limited certificate. Their salad days will be short-lived, if experience means anything. Such "cream-skimming" tactics never escape detection for long, and soon penalties and pressures are imposed. Within a reasonable time, the new operators find themselves in the plight of the old ones.

A few are lured by a misguided conviction that since transit is a cash business, there must be some advantages in it not otherwise discernible. While there may indeed be some vicarious satisfaction in all that small change, the fact is that transit companies are in a squeeze between rising costs and dipping revenues. If the coins on hand do not pay all the bills, even a Silas Marner would find little to please him at the end of the month.

This is not to say that sound investment should not be sought or cannot be found in the transit field. The point is made that

¶ "IT *is no secret that the flow of investment capital into the transit industry in recent years has not exactly been torrential. Potential investors have been counseled that transit is a high labor cost industry, that efficient operation is hamstrung by municipal traffic difficulties which are usually beyond the company's control, and that revenues in terms of passenger miles have been declining steadily since the war.*"

there is no short cut to assured solvency, or more efficient operation by merely shuffling the managerial cards or breaking in a new deck. The answer to transit's search for sound fiscal footing in the treacherous sands of an auto-jammed urban world lies elsewhere. It lies in a more realistic appraisal of the transit utility's position in the mass transportation market. It involves full development of community relations leading to better understanding of, and support for, transit's point of view. It requires the aggressive, intelligent promotion of new business by the use of the modern tools of advertising and public relations. It calls for some inspired, even daring traffic engineering leadership, a willingness to experiment, and above all a determination to convince municipal authorities that the forces of the community must get behind the transit company and its objectives to make a better city for all concerned.

THERE is undoubtedly a future for transit. It is needed today to keep downtown industrial and commercial life alive and thriving. In an emergency, it would be needed even more seriously than it was in World War II, when gas rationing practically stopped private auto travel. It is a cohesive force in community life that demands some attention from those who benefit from it whether they use it or not, and have not been reminded often enough of their responsibility to keep it vigorous.

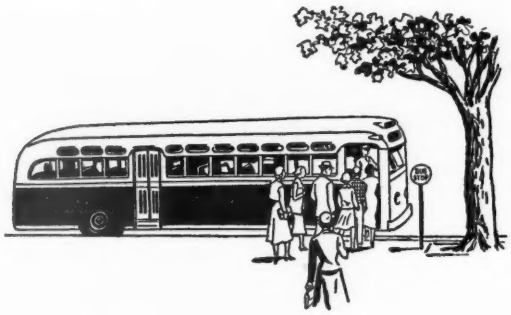
With restrictions on auto transportation and parking in urban localities bound to occur with greater frequency in the future, operating conditions seem likely to improve, thus making service more efficient. It could well be that we have reached the nadir of transit fortunes, with an upturn eventually in prospect.

This hope need not be a vain one if practical steps are taken to help it along. The situation calls for action, however, by transit officials, municipal leaders, and by community-minded businessmen at every level of the city's economy.

Transit men must talk realistically to regulating commissions, tax officials, and other key government authorities directly affecting the company's affairs. A fine example of the manner in which one transit utility addressed its plea to city tax authorities is this excerpt from the report of a traffic engineering firm in behalf of the Capitol Transit Company, in Little Rock, Arkansas. Engineers Simpson and Curtin of Philadelphia, Pennsylvania, urged elimination of local franchise and street paving taxes levied against the company as a means of improving its fiscal position and aiding its continuance in operation.

NOTING that the franchise tax was apparently imposed "because of the claim of its monopolistic character, in that it alone has the right to furnish local service," the report says ". . . transit is not a monopoly . . . there is one automobile for every 4.3 persons in Pulaski county. Thus, the entire population of the community could be transported at one time in the presently registered automobiles . . . taxes imposed because of the nonexisting monopolistic factor are no longer realistic . . ."

It will not be easy to convince tax-hungry municipalities that they should give up present levies against transit companies, for these revenues are substantial and dependable. However, the decision of several transit firms to give up their charters



Transit—A Community Asset

"THE time seems ripe for the injection on the part of transit spokesmen of a note of civic pride when talking over their affairs with local business interests. It can be clearly shown that businessmen—bankers, merchants, other utility officials, civic leaders of every stripe—will benefit from the maintenance and prosperity of privately owned transit in their community."

rather than continue to operate under distressing conditions should give local tax officials pause. Very much to the point, the brand-new report issued by the New York Public Service Commission takes the position that cities *should* look into their transit situation with an eye to lending a helping hand in saving transit systems from breakdown. The report states that the commission and its staff are "in almost constant consultation with one or more companies in an effort to assist them in evolving workable solutions to their economic problems."

The commission notes with some concern that, due to loss in patronage and rising operating costs, twenty-one omnibus operators in the state discontinued service in 1953, compared with only fifteen discontinuances in the two prior years. In thirteen of these instances, no new operator offered to enter the field and the areas were left without bus service.

Says the commission report:

> The industry's struggle for survival became so serious in 1953 that Governor Dewey appointed a special committee, headed by Commissioner Bedenkapp and assisted by transportation experts, to investigate the condition of omnibus operations in New York state and make a report of their findings, together with specific recommendations.

THE committee's findings and recommendations are not included, but the report goes on to say that "Some municipalities have taken cognizance of the problem of traffic congestion and have resolved it with varying degrees of success by the

use of one-way streets and/or the elimination of curb-side parking in downtown business areas. . . . In many communities, however, little or no action has been taken by municipal authorities to uncork the traffic bottlenecks which are threatening the economic well-being of the city and its public transportation system. The net result, in such instances, has been a growth of shopping centers in peripheral areas where convenience of parking and ready accessibility by private cars are sufficient to cause customers to revise their shopping habits and shift their patronage from stores which are located in traffic-blighted areas. This, in turn, results in further loss of bus patronage.

"Then, too, bus operators are, for the most part, still required to pay a gross receipt tax to the state and local franchise taxes to the municipalities in which they operate in addition to the regular federal income taxes and excise taxes which are normal to all business."

Municipalities might also provide aid where needed for community purposes by contracting with transit companies for the support of routes which are not profitable. Some cities have subsidized transit lines, and have gained representation on the boards of privately owned transit corporations.

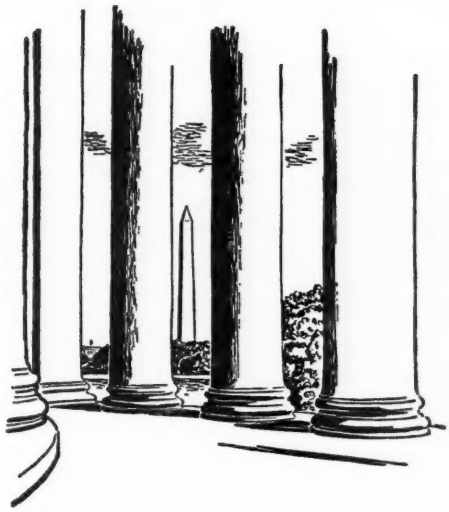
IN all these instances, the specter of municipal ownership hovers in the background. Its presence has a restraining influence generally on both sides of the table, for few managements want to go out of business, while few local administrators want to take over transit operation. There was a time when city ownership of transit was a shimmering goal to many a mayor and his council. Now the bitter experience of those who have won transit control acts as a deterrent to others. Municipal owners have had no better luck in keeping costs down and patronage up than have private businessmen.

Certainly every downtown merchant has a stake in free-flowing traffic in the heart of the city, whether or not he has taken the precaution of opening suburban branch stores. All have the mutual aim of making a sound living in a city that retains its economic health and vigor. All suffer if vehicle traffic is so thick it discourages people from coming into town at all. These men are called upon as a matter of course to take the broad civic view when dealing with other urban problems.

TRANSIT men can successfully urge them to give more consideration to *their* problems as a civic obligation. It is clear that the city as we have known it prior to the advent of 40,000,000 automobiles has a tendency to disintegrate under the auto's influence. Support of efficient urban transit can be sought as not only an intelligent civic accomplishment but as darned good business!

Transit men know the answers to their problems. They must become much more vocal, much more convincing, and they must make much greater effort to win friends and influence people than even Dale Carnegie dreams of in his philosophy. The job of turning the tide of transit's fortunes upward cannot be done alone. With the right approach to those who can help, necessary aid on the part of private and public interests can be invoked. It is as simple, and as difficult, as that.

Washington and the Utilities



Area Transit Bill Vetoed

Of special interest to the transit industry was the action of President Eisenhower in vetoing a bill passed by the 83rd Congress to set up a transit commission and to study transit controls in the metropolitan area of Washington, D. C. It was a dual-purpose enactment. First, it would set up a special transit commission which could have jurisdiction over streetcar, bus lines, etc., operating between the District of Columbia and its Maryland suburbs. Second, it would set up a study commission to consider transit problems peculiar to the greater metropolitan area.

Pointing out that the bill failed to include the equally important Virginia suburbs, President Eisenhower vetoed the bill as being inadequate for its own avowed purposes. He said he was in sympathy with the objective of the bill, but thought that more effective legislation should be drafted in the next Congress. Because of the question of unifying regulatory authority now exercised, piecemeal, in the area by the Maryland, Virginia, and District of Columbia commissions, any federal bill along these lines is bound to run into legal and political complications.

What Hath Congress Wrought?

The second and probably the last session of the 83rd Congress piled up an unexpected number of legislative accomplishments for the Eisenhower administration, despite the razor-thin GOP majority control in both branches. But in the field of legislation especially concerning the utilities, the number of enactments was comparatively modest, quantitively speaking.

Qualitatively speaking, by far the most important was the 1954 amendment to the Atomic Energy Act of 1946 (comprehensively reviewed in a feature article in Public Utilities Fortnightly, issue of September 16, 1954). It is generally agreed that this new law, ending federal monopoly in the important atomic energy field, as far as peacetime applications are concerned, may eventually prove to be the most important law passed by the 83rd Congress or by a good many other Congresses. In any event, it has now been put into the statute books as Public Law No. 703.

From a strictly regulatory point of view, the work of the second session was of

less significance. Most important was the Hinshaw Bill, known as Public Law No. 323, amending the Natural Gas Act by exempting intrastate gas distributors from the jurisdiction of the FPC. In some respects this law set aside the decision on this subject by the U. S. Supreme Court in the celebrated East Ohio Gas Company Case.

Of importance to the telephone companies was the Rogers-O'Hara Bill, which became Public Law No. 345, amending by way of clarification § 2(b)(2) of the Federal Communications Act. In effect, this statute allows small telephone companies, otherwise exempt from the full jurisdiction of the FCC, to enjoy that exemption notwithstanding the use of radio or electronic facilities as part of their intrastate systems.

By joint congressional resolution, sponsored by Senator Johnson (Democrat, Colorado), Public Law No. 558 sets up the so-called Commission on International Telecommunications. This is a study group which will advise the federal government on location and operation of propaganda facilities, such as the Voice of America.

Public Law No. 750 extends the Secretary of Interior's authority to enter into revision of repayment contracts under the Reclamation Act.

Except for the usual appropriations bills and some minor project enactments, this about completes the work of the second session of special interest to utilities. This is aside, of course, from the important tax legislation reducing excise taxes and making other changes in the new general tax revision bill, which has already been widely discussed in the press.

Gas Order Hearing

The Federal Power Commission caught Washington observers by surprise when it announced, on September 8th, that oral arguments on its controversial Order No. 174-A for regulating independent natural gas producers would be held on September 22nd.

About a hundred petitions, questioning the order, had been filed with the FPC since its issuance on August 6th. In setting the argument date, the FPC said that requests for stay of the order are "without reasonable justification and must be denied."

The FPC's action came just as the applicability of the disputed Order No. 174-A highlighted hearings before the commission on the American Louisiana Pipe Line Company's application to build a $160,000,000 natural gas transmission system linking Gulf producing fields with gas markets in Michigan, Wisconsin, and other central states.

The order was promulgated by FPC following the U. S. Supreme Court's Phillips Petroleum Company Case, which ruled that production and gathering are subject to FPC jurisdiction. The decision and subsequent order aroused a storm of protest.

The commission said that the hundred petitions which it has received assert that the issuance of the order without notice and hearing (1) constitutes a deprivation of procedural due process, (2) violates the Administrative Procedures Act, (3) deprives petitioners of substantive rights guaranteed by due process of law, (4) transgresses rights reserved to the states under the Tenth Amendment, and (5) assumes authority not delegated to FPC under the Natural Gas Act.

Financial News and Comment

By OWEN ELY



Trends of the Transit Industry

THE year 1953 showed a further "settling" tendency in the operations of the transit industry in the United States, but financial results showed some improvement. The total number of operating companies decreased from 1,620 to 1,605; the number of trolley coach companies remained unchanged, but electric railway companies declined from 75 to 70 and motorbus concerns dropped from 1,578 to 1,565.

The miles of surface railways operated declined 10 per cent to 3,485, but subway and elevated line mileage remained about the same. Trolley coach mileage declined over one per cent but motorbus line mileage increased from 43,960 to 47,000, so that total line mileage gained about 5 per cent. The number of vehicles declined about 4 per cent, the major reduction being in surface cars, which numbered 7,990 compared with 9,700 in the previous year. Trolley coaches and motorbuses in operation were off slightly.

TOTAL investments remained almost the same at $3.9 billion—the decline in surface railways being almost matched by increases elsewhere. Annual revenues increased $11,500,000 in 1953 to $1,512,800,000. Here again the decline of about $29,000,000 in surface railway revenues was more than made up by increases elsewhere, due largely to increases in fares.

Vehicle mileage declined, and also the number of revenue passengers carried, as follows:

	Millions	
	1953	*1952*
Vehicle Miles Operated		
Surface Cars	274	321
Subway and Elevated Cars	391	400
Trolley Coach	212	215
Motorbus	1,819	1,878
Revenue Passengers		
Surface Railways	1,403	1,714
Subway and Elevated	1,903	1,982
Trolley Coach	1,137	1,201
Motorbus	6,593	7,125

Undoubtedly, the decline in traffic appeared due to the continued increase in the number of private automobiles, along with the 1954 letdown in manufacturing activity.

DEPARTMENT INDEX

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THE industry's total payroll increased by $10,000,000 to $913,000,000, while the number of employees dropped 7,000 to 220,000. The average annual compensation (not including fringe benefits) increased from about $3,978 to $4,150, a gain of over 4 per cent.

The number of rides per capita population also declined, the long-term trend being indicated by the following table:

1935	63	1951	66
1940	65	1952	62
1945	115	1953	57
1950	72		

Expenditures for materials were lower by about 3 per cent at $203,000,000, the largest declines being in the cost of coal and gasoline. There was only a small reduction in the cost of purchased power. As a result of fare increases, revenues gained $11,500,000 in 1953 and with operating expenses about the same and taxes down nearly $5,000,000, the transit industry was able to increase operating income from $29,749,000 in 1952 to $44,745,000—still considerably less than the industry is entitled to, but a step in the right direction. Fortunately, most transit companies (as a result of reorganizations and other changes) are now capitalized on a very conservative basis, so that the industry remains generally solvent despite the heavy decline in operating income in the postwar period. (In 1943 operating income reached a high of about $175,000,000.)

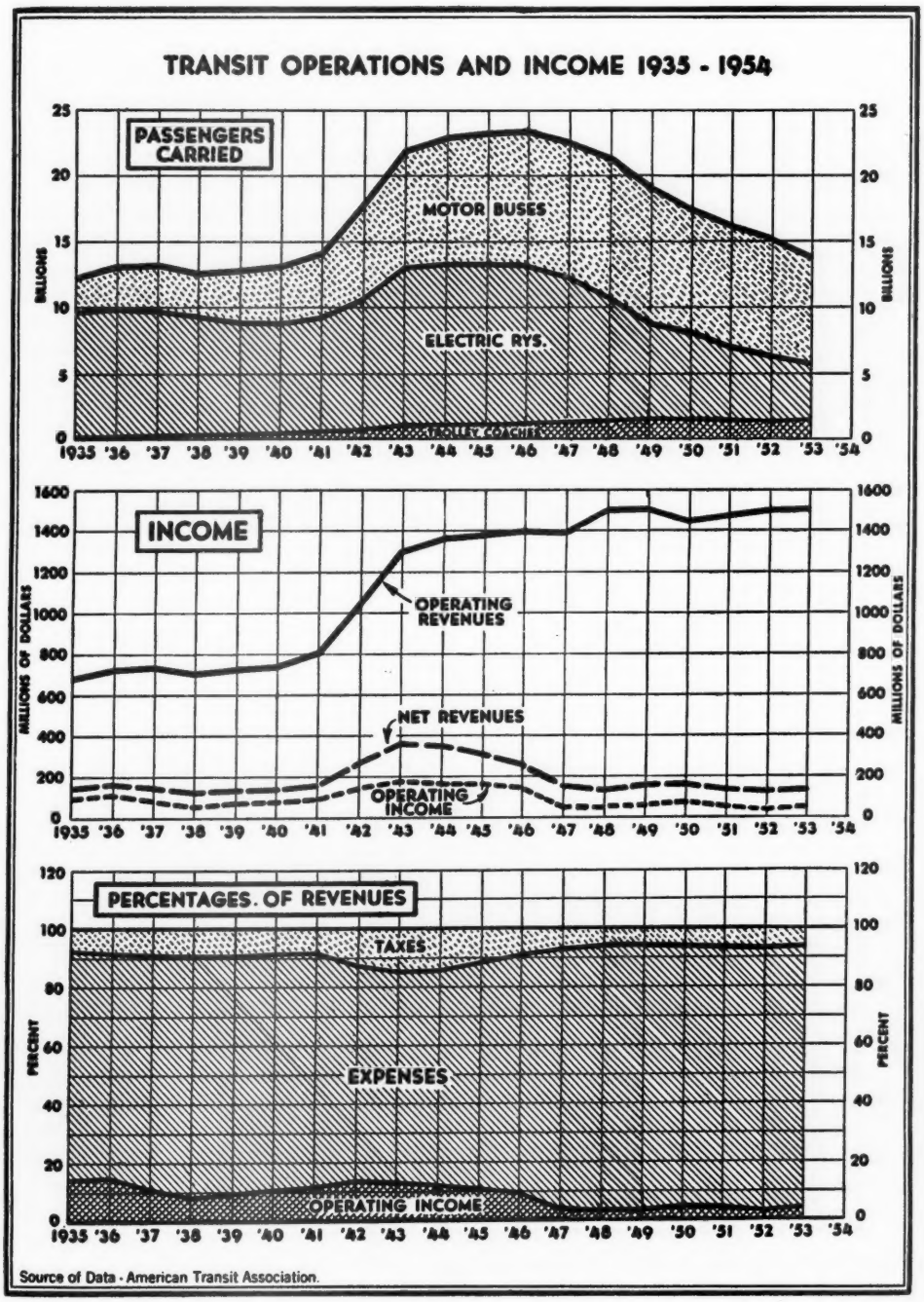
THE figures given above are based on data compiled by the American Transit Association in its annual "Fact Book," which covers the entire industry, including both municipally operated and privately owned systems. The results are not necessarily an accurate picture of the trend of the private segment of the industry. Thus, a breakdown of revenues for the years 1952-53 indicates subway and elevated lines (which are doubtless all municipal, with New York city a large proportion of the total) showed increased revenues of about $25,000,000, while the surface lines showed a decline of about $29,000,000 or nearly 11 per cent. The increase in fares in New York city from 10 cents to 15 cents probably was an important factor in the revenue figures for the industry.

Nineteen hundred fifty-three was the first year since 1940 or earlier that the transit industry failed to order any new trolley coaches, and the first since 1946 that no surface, subway, or elevated railway cars were bought. However, 2,246 motorbuses were purchased, as compared with 1,749 in the year 1952; these were probably all for replacements, since the number of busses in service declined by 1,280. On an over-all basis the number of cars, coaches, and busses in service dropped about 4 per cent.

The Transit Problem—Bus versus Auto

THE transit companies are beginning to fight back more aggressively against the obstacles confronting them—traffic congestion, fewer passengers due to greater use of automobiles, mounting operating costs, difficulties in obtaining increased fares and in obtaining approval for necessary cuts in service. City officials are being told that they have as much responsibility to the public as does the transit company. Also, transit officials are making it clear they do not intend to stay in business unless they can fulfill the first objective of going into business—making money.

The number of transit riders now is just about the same as before World War II, but the riders are *spread out over a larger area*. Hence, it has become necessary to


TRANSIT OPERATIONS AND INCOME 1935 - 1954
PASSENGERS CARRIED
MOTOR BUSES
ELECTRIC RYS.
TROLLEY COACHES
BILLIONS
INCOME
OPERATING REVENUES
NET REVENUES
OPERATING INCOME
MILLIONS OF DOLLARS
PERCENTAGES OF REVENUES
TAXES
EXPENSES
OPERATING INCOME
PERCENT
1935 '36 '37 '38 '39 '40 '41 '42 '43 '44 '45 '46 '47 '48 '49 '50 '51 '52 '53 '54
Source of Data - American Transit Association.

eliminate unprofitable runs or reduce the frequency of service, particularly on evenings and Sundays. If these economies cannot compensate for the loss of revenue passengers, fares must be increased. But the transit companies have to contend with the same problem as other utilities—regulatory lag. Approval for either a fare increase or a cut in service must be sought from the regulatory commission (usually a state body) and local politics must also be taken into consideration. There may be a long delay before the commission even considers the application; then there will be hearings, brief filings, and another delay in reaching a final decision. As a result, by the time an increase in fare is approved the company may be encountering another wage increase, so that the cycle has to start all over again.

THE industry is also up against the old law of "decreasing returns"—if the fare is raised too much, fewer people will ride and revenues may fall off. There has been considerable experimenting to see what could be done about getting people to ride again. Increased service does not always help. In St. Louis in 1951, with much publicity and advertising, service was doubled on four major routes in an effort to induce people to ride transit. This experiment was abandoned after ninety days when results showed additional returns of from five to seven cents per mile, as against out-of-pocket operating costs of from 30 to 40 cents per mile.

Efforts have been made to educate the public. Research studies show that with parking costs and other factors taken into account, transit provides a dollar's ride value for about 20 cents. This approach, together with arguments as to the stress and strain of modern-day driving and parking downtown, has not always proved helpful in restraining people from driving their own cars into the heart of the city. However, a questionnaire circulated in Wichita, Kansas, revealed that of the one-third or more of the people on downtown streets who came by bus, some 34 per cent said they traveled this way because it was more convenient or cheaper, and nearly one-third said they could not find a place to park their cars. Perhaps if similar studies were made in other cities and the results publicized, traveling by transit might gain new recruits.

BY 1960, it is forecast, there will be more than 18,000,000 additional private motor vehicles registered. Without transit, this would mean that for every 150 people downtown there would be 100

CURRENT YIELD YARDSTICKS

	*Sept. 9, 1954**	*1954 Range*		*1953 Range*	
		High	*Low*	*High*	*Low*
U. S. Long-term Bonds—Taxable	2.49%	2.70%	2.41%	3.15%	2.70%
Utility Bonds—Aaa	2.94	3.13	2.86	3.43	3.01
Aa	2.99	3.19	2.92	3.59	3.07
A	3.11	3.37	3.12	3.72	3.23
Baa	3.44	3.72	3.44	3.94	3.50
Utility Preferred Stocks—High-grade	3.91	4.09	3.89	4.45	4.01
Medium-grade	4.23	4.51	4.22	4.87	4.43
Electric Utility Common Stocks	4.66	5.23	4.55	5.72	5.01

* Approximate date.

Latest available Moody indices are used for utility bonds and stocks; Standard & Poor's indices for government bonds.

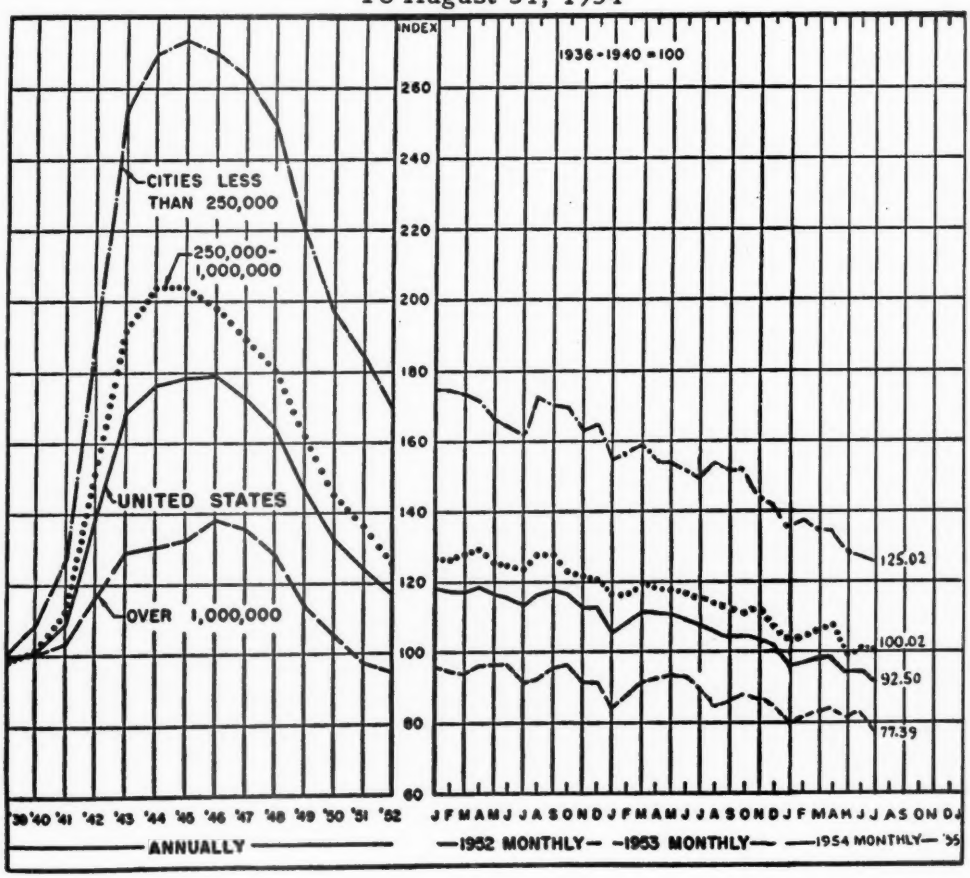
automobiles clamoring for parking space and milling around endlessly. Obviously, such a situation would be entirely chaotic and intolerable. In trying to end traffic jams, the cities are devoting considerable attention to the movement of *vehicles,* setting up one-way streets, changing signals, etc. But the transit people contend that it is more important to study the movement of *people.* The automobile usually carries only 1½ people, while the bus or streetcar (occupying the space of less than three automobiles and not requiring parking space) can carry 30 to 40 times as many.

Transit Companies Show Some Improvement in Earnings

THE transit companies, beset by annual demands for higher wage rates while fare increases do not always produce much additional revenue, were able on balance

TREND OF TRANSIT TRAFFIC - 1939 - 1954

To August 31, 1954



to make a slightly better showing in 1953.

Greyhound Corporation, the giant of the industry with revenues of about $245,000,000, has had very stable earnings, with share earnings varying only between $1.22 and $1.27 during 1949-53. However, share earnings in the first quarter of 1954 were only 3 cents *versus* 13 cents last year, and in the second quarter 32 cents *versus* 35 cents.

The next largest transit company, Philadelphia Transportation Company with annual revenues of $73,000,000, reported no net income in 1952-53. This year, however, 62 cents a share was earned on the common stock in the first six months due to substantial fare increases resulting from a new property valuation and a 6½ per cent return allowed by the commission and affirmed by the superior court. As the result, the company resumed dividend payments July 29th.

National City Lines, with about $30,000,000 revenue, has 43 active subsidiaries in 14 states, thus diversifying its operations. It made a substantially improved earnings statement last year ($2.35 a share *versus* $1.86). In 1954 first-

AUGUST UTILITY FINANCING

PRINCIPAL PUBLIC OFFERINGS OF ELECTRIC AND GAS UTILITY SECURITIES

Date	*Amount*	*Description*	*Price To Public*	*Underwriting Spread*	*Offering Yield*	*Moody Rating*	*Indicated Success of Offering*
		Mortgage Bonds and Debentures					
8/10	$30.0	Pacific P. & L. 1st 3⅜s, 1984	102.82	.69C	3.35	Baa	c
8/18	8.7	New Jersey P. & L. 1st 3⅜s, 1984	101.25	.48C	3.06	A	d
8/19	30.0	Southern Calif. Edison 1st 3s, 1979	100.53	.51C	2.97	Aa	d
8/25	7.5	Arkansas P. & L. 1st 3⅛s, 1984	101.93	.59C	3.15	A	a
8/25	25.0	Niagara Mohawk Pow. 1st 3⅛s, 1984	102.26	.65C	3.01	Aa	d
		Preferred Stocks					
8/11	1.5	Southern Colorado Power 4.72% ($50 par)	50	1.60N	4.72	—	a
8/17	5.0	Missouri Pub. Ser. 4.30%	100	1.85N	4.30	—	a
8/25	20.0	Northern States Power $4.11	101.73	1.61C	4.04	—	c
						Earnings-Price Ratio	
		Common Stocks—Offered to Public					
8/4	4.9e	Northern Illinois Gas	21	.72C	3.81	4.42	b

a—Reported well received. b—Reported fairly well received. c—Reported issue sold somewhat slowly. d—Reported issue sold slowly. e—The stock was sold for those stockholders of Commonwealth Edison (who received the stock as a dividend) who preferred cash. C—Competitive bidding. N—Negotiated issue.

AUGUST NEW MONEY FINANCING
(In Millions)

	Offered to Stockholders	*Sold to Public*	*Sold Privately*	*Total Financing*
Electric Companies				
Bonds	—	$72	$13	$ 85
Preferred Stock	—	3	12	15
Common Stock	—	—	—	—
Total	—	$75	$25	$100

Gas utilities did no new money financing, except for one very small issue. For purposes other than refunding, electric utilities sold $30,000,000 bonds and $24,000,000 preferred stock to the public; gas utilities sold $4,000,000 bonds privately, and $5,000,000 common stock to the public.
Source of data—Irving Trust Company.

quarter earnings were the same as last year, but the second quarter showed substantial improvement due to profits on sale of securities. If this item were excluded, however, operating earnings would have declined.

St. Louis Public Service earnings gained sharply last year, Los Angeles Transit gained moderately, and Twin City Transit again earned money on the common stock after failing to do so for four years. Cincinnati Transit's share earnings slipped a little, and Dallas Railway & Terminal profits declined sharply, so that the dividend rate was recently cut in half.

An Optimistic View On the Market

IN the September 2nd issue a bearish view on utility stocks expressed by Truslow Hyde of Josephthal & Co. was discussed. While utilities declined with other stocks during the latter part of August, they have since recovered. The following quoted from a bulletin of Goodbody & Co. (signed by Ted Locke) may be of interest:

> Utility stocks have recently been selling at about the highest prices in many years, except for the extremely high market in 1946. . . . Most of our customers are investors—they have bought utilities for investment purposes. Most have considerable capital gains. If they sold they would have to pay 25 per cent of their profits and put the balance of the proceeds in something else. . . . Most institutions own utility stocks which were bought at a much lower level. They would be better off to keep these stocks and retain their lower cost figure. . . . The growth of the industry is so consistent that even though many utility stocks now seem high priced, the development of higher earnings over a period of time should justify present prices and considerably more eventually.

DATA ON ELECTRIC UTILITY STOCKS

1953 Rev. (Mill.)			*9/9/54 Price About*	*Div. Rate*	*Current Yield*	*Share Earnings* Cur. Period*	*% Increase*	*12 Mos. Ended*	*Price-Earns. Ratio*	*Dividend Pay-out*	*Moody Bond Rating*
$223	S	American Gas & Elec.	35	$1.64#	4.7%	$2.37**	D7	July	14.8	69%	—
31	O	Arizona Public Service	21	.90	4.3	1.45	29	July	14.5	62	—
8	O	Arkansas Mo. Power	22	1.12	5.1	1.68	NC	June	13.1	67	—
25	S	Atlantic City Elec.	35	1.50b	4.3	2.10**	9	July	16.7	71	Aa
5	O	Bangor Hydro-Elec.	32	1.80	5.6	2.22	23	June	14.4	81	—
4	O	Black Hills P. & L.	24	1.28	5.3	2.06	19	April	11.7	62	—
82	S	Boston Edison	52	2.80	5.4	2.90	D3	June	17.9	97	Aaa
18	A	Calif. Elec. Power	12	.60	5.0	.86	5	June	14.0	70	A
14	O	Calif. Oregon Power	30	1.60	5.3	1.60	19	May	18.8	100	A
6	O	Calif.-Pacific Utilities	27	1.40	5.2	2.12**	6	July	12.7	66	—
52	S	Carolina P. & L.	23	1.00	4.3	1.59	25	July	14.5	63	A
21	S	Central Hudson G. & E. ...	15	.70	4.7	.97	15	June	15.5	72	—
15	O	Central Ill. E. & G.	30	1.60	5.3	1.99	D6	Mar.	15.1	80	A
29	S	Central Ill. Light	44	2.20	5.0	2.88	D1	June	15.3	76	Aa
40	S	Central Ill. P. S.	22	1.20	5.5	1.62	19	June	13.6	74	A
9	O	Cent. Louisiana Elec.	26	1.20	4.6	1.47	3	June	17.7	82	Ba
27	O	Central Maine Power	23	1.20	5.2	1.84	38	July	12.5	65	A
96	S	Central & South West	27	1.16	4.3	1.74	10	June	15.5	67	—
9	O	Central Vermont P. S.	17	.84	4.9	1.03	10	July	16.5	82	A
89	S	Cincinnati G. & E.	24	1.00#	4.2	1.63	14	June	14.7	61	Aaa
5	O	Citizens Utilities	17	.48a	5.8a	1.05	14	June	16.2	46	Baa
91	S	Cleveland Elec. Illum.	63	2.60	4.1	4.04	7	June	15.6	64	Aaa
3	O	Colorado Cent. Power	26	1.20	4.6	1.62	17	June	16.0	74	—
32	S	Columbus & S. O. E.	30	1.60	5.3	2.04	—	June	14.7	78	A

1953 Rev. (Mill.)		(Continued)	9/9/54 Price About	Rate Div.	Cur. rent Yield	Share Earnings* Cur. Period	% In- crease	12 Mos. Ended	Price- Earns. Ratio	Divi- dend Pay- out	Moody Bond Rating
329	S	Commonwealth Edison	44	1.80c	4.1	2.38	3	June	18.5	76	Aaa
10	A	Community Pub. Service ..	23	1.00#	4.3	1.57	2	June	14.6	64	—
1	O	Concord Electric	37	2.40	6.5	2.48	31	Dec.	14.9	97	—
55	O	Connecticut L. & P.	18	.94	5.2	1.20	23	June	15.0	78	Aaa
18	O	Connecticut Power	43	2.25	5.2	2.16	D10	June	19.9	104	Aaa
454	S	Consol. Edison	46	2.40	5.2	2.86	D4	June	16.1	84	Aa
98	S	Consol. Gas of Balt.	31	1.40	4.5	1.69	D15	June	18.3	83	Aaa
158	S	Consumers Power	47	2.20	4.7	3.04	20	July	15.5	72	Aa
57	S	Dayton P. & L.	43	2.00	4.7	2.89	7	June	14.9	69	Aa
28	S	Delaware P. & L.	31	1.40	4.5	2.02	17	July	15.3	69	Aa
192	S	Detroit Edison	33	1.60	4.8	1.95	1	July	16.9	82	Aa
107	A	Duke Power	51	1.85	3.6	3.27	20	June	15.6	57	Aa
82	S	Duquesne Light	35	1.72	4.9	2.30	8	June	15.2	75	A
27	O	Eastern Util. Assoc.	33	2.00	6.1	2.37	D10	June	13.9	84	—
2	O	Edison Sault Elec.	11	.50	4.5	.92	42	June	12.0	54	—
9	O	El Paso Elec.	35	1.60	4.6	2.23	20	July	15.7	72	A
10	S	Empire Dist. Elec.	26	1.40	5.4	2.11	D8	June	12.3	66	Baa
4	O	Fitchburg G. & E.	52	3.00	5.8	2.80	D7	Dec.	18.6	107	—
32	S	Florida Power Corp.	35	1.50	4.3	2.10	19	June	16.7	71	A
70	S	Florida P. & L.	49	1.80	3.7	3.41	18	June	14.4	53	A
156	S	General Pub. Util.	34	1.70	5.0	2.31	9	June	14.7	74	—
5	O	Green Mt. Power	28	1.50	5.4	1.85	3	June	15.1	81	Ba
43	S	Gulf States Util.	32	1.40	4.4	1.89	14	July	16.9	74	Aa
21	A	Hartford E. L.	57	2.75	4.8	3.34	12	June	17.1	82	Aaa
5	O	Haverhill Elec.	45	2.50†	5.6	2.99	10	Dec.	15.1	84	—
53	S	Houston L. & P.	38	1.20	3.2	2.11	17	July	18.0	57	Aa
7	O	Housatonic P. S.	24	1.40	5.8	1.47	11	Dec.	16.3	95	—
22	B	Idaho Power	51	2.20	4.3	3.43	8	June	14.9	64	Aa
62	S	Illinois Power	49	2.20	4.5	2.76	D1	July	17.8	80	A
35	S	Indianapolis P. & L.	24	1.10	4.6	1.61	5	June	14.9	68	A
17	S	Interstate Power	13	.70	5.4	.93	1	June	14.0	75	A
23	O	Iowa Elec. L. & P.	24	1.20	5.0	1.69	8	July	14.2	71	—
28	S	Iowa-Ill. G. & E.	32	1.80	5.6	2.04	D15	June	15.7	88	Aa
29	S	Iowa Power & Light	28	1.40	5.0	1.80	D6	June	15.6	78	Aa
25	O	Iowa Pub. Service	28	1.40	5.0	1.98	15	July	14.1	71	A
1	O	Iowa Southern Util.	20	1.20	6.0	1.44	D11	July	13.9	83	Baa
46	S	Kansas City P. & L.	36	1.80	5.0	2.17	3	July	16.6	83	Aaa
22	O	Kansas Gas & Elec.	47	2.40	5.1	3.60	14	July	13.1	67	A
34	S	Kansas Pr. & Lt.	21	1.12	5.3	1.44	5	June	14.6	78	Aa
31	O	Kentucky Utilities	24	1.12	4.7	1.89	15	June	12.7	59	A
6	O	Lake Superior D. P.	37	2.00	5.4	2.83	7	June	13.1	71	A
5	O	Lawrence Electric	27	1.40†	5.2	1.87	18	Dec.	14.4	75	Aa
67	S	Long Island Lighting	23	1.00	4.3	1.27	18	June	18.1	79	A
39	S	Louisville G. & E.	47	1.80	3.8	3.20	—	June	14.7	56	Aa
7	O	Lowell Elec. Lt.	57	3.50†	6.1	3.74	3	Dec.	15.2	94	—
8	O	Lynn G. & E.	31	1.60	5.2	2.14	14	Dec.	14.5	75	Aa
7	O	Madison G. & E.	39	1.60	4.1	3.13	16	Dec.	12.5	51	Aa
3	A	Maine Public Service	28	1.60	5.7	1.83	5	July	15.3	87	Baa
5	O	Michigan G. & E.	39	1.35#	6.5a	2.98	7	June	13.1	45	Baa
127	S	Middle South Util.	32	1.50	4.7	1.96	9	June	16.3	71	—
20	S	Minnesota P. & L.	24	1.20	5.0	1.83	D3	June	13.1	66	A
2	O	Miss. Valley P. S.	25	1.40	5.6	2.27	7	Aug.	11.0	61.7	—
9	A	Missouri P. S.	38	1.80	4.7	2.77†	NA	June	13.7†	65†	—
5	O	Missouri Utilities	22	1.00	4.6	1.79	10	June	12.3	56	—
31	S	Montana Power	35	1.60	4.6	2.64	D5	July	13.3	61	Aa
118	S	New England Elec.	16	.90	5.6	1.25	10	June	12.8	72	Baa
38	O	New England G. & E.	17	1.00	5.9	1.37**	D6	July	12.4	73	Baa
41	O	New Orleans P. S.	45	2.25	5.0	2.62	4	July	17.2	86	A
2	O	Newport Electric	37	2.00	5.4	2.62	D18	July	14.1	76	—
68	S	N. Y. State E. & G.	42	2.00	4.8	2.68	15	July	15.7	75	A
204	S	Niagara Mohawk Power ..	32	1.60	5.0	2.04	2	June	15.7	78	Aa
63	O	Northern Ind. P. S.	31	1.60	5.2	2.28	5	July	13.6	70	A
110	S	Northern States Pr.	16	.80	5.0	1.03	5	June	15.5	78	Aa
8	O	Northwestern P. S.	16	.90	5.6	1.22	D13	June	13.1	74	A
109	S	Ohio Edison	43	2.20	5.1	2.93	9	July	14.7	75	Aa
35	S	Oklahoma G. & E.	31	1.50	4.8	1.86	D5	July	16.7	81	A

1953 Rev. (Mill.)		(Continued)	9/9/54 Price About	Div. Rate	Current Yield	Share Earnings* Cur. Period	% Increase	12 Mos. Ended	Price-Earns. Ratio	Dividend Payout	Moody Bond Rating
14	O	Otter Tail Power	27	1.50	5.6	2.09	D13	July	12.9	72	—
364	S	Pacific G. & E.	45	2.20	4.9	2.72	27	Mar.	16.5	81	Aa
22	O	Pacific P. & L.	24	1.20	5.0	1.62	NC	May	14.8	74	Baa
106	S	Penn Power & Light	44	2.40	5.5	2.82	23	July	15.6	85	A
8	A	Penn. Water & Power	46	2.00	4.3	2.07	D5	June	22.2	97	A
7	S	Phila. Elec.	37	1.80	4.9	2.41	5	June	15.4	75	Aaa
27	O	Portland Gen. Elec.	21	1.00	4.8	1.37	12	July	15.3	73	Baa
50	S	Potomac Elec. Pr.	19	1.00	5.3	1.19	7	July	16.0	84	Aa
56	S	Pub. Serv. of Colo.	41	1.60	3.9	2.36	1	June	17.4	68	Aa
230	S	Pub. Serv. E. & G.	29	1.60	5.5	1.86**	D12	June	15.6	86	Aa
59	S	Public Serv. of Ind.	39	2.00	5.1	2.34	3	July	16.7	85	Aa
21	O	Public Serv. of N. H.	17	.90	5.3	1.00	D3	June	17.0	90	A
8	O	Public Serv. of N. M.	14	.68	4.9	.77	4	June	18.2	88	—
20	O	Puget Sound P. & L.	31	1.64	5.3	1.92	21	July	16.1	85	Baa
46	S	Rochester G. & E.	45	2.24	5.0	3.16	D4	June	14.2	71	A
12	O	Rockland L. & P.	17	.60	3.5	.68	D4	Dec.	25.0	88	A
7	S	St. Joseph L. & P.	22	1.20	5.5	1.72	7	June	12.8	70	A
36	S	San Diego G. & E.	17	.80	4.7	1.31	16	June	13.0	61	Aa
7	O	Sierra Pacific Pr.	35	2.00	5.7	2.46	D17	July	14.2	81	Baa
140	S	So. Calif. Edison	44	2.00	4.5	2.65	10	June	16.6	75	Aa
29	S	So. Carolina E. & G.	18	.80	4.4	1.26	58	June	14.3	63	Baa
5	O	Southern Colo. Pr.	14	.70	5.0	1.23	18	May	11.4	57	—
180	S	Southern Company	18	.80	4.4	1.24	5	July	14.5	65	—
13	S	So. Indiana G. & E.	28	1.50	5.4	2.05	12	July	9.8	73	Aa
3	O	So. Nevada Power	16	.80	5.0	1.39	NC	Mar.	11.5	58	—
1	O	Southern Utah Power	15	1.00	6.7	.89	D43	July	16.9	112	—
3	O	Southwestern E. S.	20	1.00	5.0	1.52	8	May	13.2	66	—
31	S	Southwestern P. S.	27	1.32	4.9	1.69	17	June	16.0	78	A
17	A	Tampa Elec.	60	2.80	4.7	3.77	5	July	15.9	74	Aa
109	S	Texas Utilities	56	2.08	3.7	3.34	8	July	16.8	62	Aa
34	S	Toledo Edison	15	.70	4.7	.94	2	June	16.0	74	A
10	O	Tucson G. E. L. & P.	22	.92	4.2	1.48	8	June	14.9	62	—
103	S	Union Elec. of Mo.	26	1.20	4.6	1.48	17	May	17.6	81	Aa
27	O	United Illuminating	49	2.50†	4.9	2.89	6	Dec.	16.9	83	—
2	O	Upper Peninsula Pr.	25	1.20	4.8	2.46	136	June	10.2	49	Baa
30	S	Utah Power & Light	41	2.00	4.9	2.53	2	July	16.2	79	A
84	S	Virginia E. & P.	31	1.40	4.5	2.08	24	July	14.9	67	Aa
22	S	Washington Water Pr.	34	1.60	4.7	1.85	8	July	18.4	86	A
115	S	West Penn Elec.	45	2.40	5.3	3.58	5	July	12.6	67	—
62	O	West Penn Power	45	2.40	5.3	2.71	8	June	16.6	89	Aa
9	O	Western Lt. & Tel.	28	1.60	5.7	2.24	D5	June	12.5	71	A
22	O	Western Mass. Cos.	39	2.00	5.1	2.73	12	June	14.3	73	—
84	S	Wisconsin Elec. Pr.	32	1.50	4.7	2.03	—	Mar.	15.8	74	Aa
32	O	Wisconsin P. & L.	25	1.28	5.1	1.73	11	June	14.5	74	A
30	S	Wisconsin Pub. Ser.	20	1.10	5.5	1.44	5	June	13.9	76	A
		Averages			5.0%				15.2	74%	
		Foreign Companies									
$219	S	American & Foreign Pr.	11	$ .60	5.5%	$2.28	2%	Mar.	4.8	26%	—
116	A	Brazilian Trac. L. & P.	8	1.00	12.5	1.40	D53	Dec.	5.7	71	—
56	A	British Columbia Pr.	25	1.00	4.0	1.47	15	Dec.	17.0	68	—
15	A	Gatineau Power	27	1.20	4.4	1.77	10	Dec.	15.3	68	Baa
31	O	Mexican L. & P.	8	—	—	—	—	—	—	—	—
9	A	Quebec Power	28	1.20	4.3	1.57	23	Dec.	17.8	76	Baa
42	A	Shawinigan Water & Pr.	52	1.45	2.8	2.26	17	Dec.	23.0	64	Baa

B—Boston Exchange. A—American Stock Exchange. O—Over-counter or out-of-town exchange. S—New York Stock Exchange. D—Decrease. NC—No comparable figures available. *If additional common shares have been recently offered, earnings are adjusted to give effect to the offering. Percentage change is in the net income available for common stock. Tax savings resulting from accelerated amortization of defense facilities are excluded (when separately reported). **Based on average number of shares. a—Also regular annual 3 per cent stock dividend which is included in the yield. b—Also 5 per cent stock dividend. c—Also 1/25 share of Northern Illinois Gas for each share of Commonwealth Edison. #Also occasional stock dividends. †Estimated. NA—Not available.



What Others Think

Urban Transit Trends

THE most recent developments throughout the country in the field of urban transit regulation and financing show the hard-pressed transit industry in a continual battle for survival against mounting deficits, local taxation, inadequate rate relief, and increasing competition from the automobile. In Little Rock, Arkansas, a report submitted to the city by Hawley S. Simpson, senior member of the Philadelphia traffic engineering firm of Simpson & Curtin, recommended elimination of the local franchise and street maintenance taxes, along with abolition of street parking on 16 downtown city blocks, as the first step in aiding the city's Capitol Transit Company.

Simpson challenged the basis of the franchise tax, which is apparently levied on grounds that the company is monopolistic in character in that it, alone, has the right to furnish local transit service. Actually, Simpson said, the transit system is not a monopoly. ". . . there is one automobile for every 4.3 persons in Pulaski county," he noted. "Thus, the entire population of the community could be transported at one time in the presently registered automobiles. . . . taxes imposed because of the nonexistent monopolistic factor are no longer realistic," Simpson declared. He explained:

> Since the segment of the population which uses mass transportation most intensively is generally in the lower income groups, special franchise taxes for the use of streets fall heaviest upon those least able to afford it. When such taxes originated, they were equitably distributed over the whole public because the total population were regular users of mass transportation. Since this is no longer true, it follows that the burden once borne by all has been shifted to those in the earnings brackets to whom slight increases in living costs —of which transporation is an important element—are of greatest significance.

SIMPSON said the imposition of outmoded and unrealistic charges on public transportation encourages more persons to seek other means of travel—exclusively the automobile. Higher operating costs and fares thus drive persons from the most economic and efficient vehicle to the least economic and most inefficient. The result, Simpson declared, is an increasing demand from the public for the construction of more and wider highways, and pressure upon public authority for the installation of free or low-cost parking facilities in urban shopping centers.

IN a Maryland transit rate case, the Baltimore Transit Company filed an appeal with the state circuit court from a state public service commission order allowing the company a 1-cent increase in bus and streetcar fares, but refusing to grant the 3-cent rate boost sought by the utility. The company charges that the rate base used by the commission is "grossly inadequate" because it gives no effect to "greatly increased present values over costs and values." It was further contended by the company that the "minimum rate base" used by the commission includes an arbitrary figure of 60 per cent for accrued depreciation and gives no effect to substantial contributions to depreciation reserves by stockholders. Attorneys for the city of Baltimore asked the court to cancel the 1-cent increase allowed by the commission on the theory that "the stockholders of a utility corporation are not entitled to make any profit out of inadequate or unsafe service to the public."

An application by the Kansas City Public Service Company for transit system service curtailments, subsequently authorized by the Missouri Public Service Commission, brought a demand for public acquisition of the company by the four cities of the greater Kansas City area. Ilus W. Davis, chairman of the Kansas City council's public utilities committee, suggested an arrangement whereby the four cities would purchase the company on a pro rata basis and operate it under a contract with a private enterprise. Public acquisition of the company's property, Davis said, would eliminate two substantial overhead costs —the property and gross receipts taxes. These taxes amount to about $400,000 a year.

On the basis of service value, Kansas City, Missouri, probably would have to pay about 80 per cent of the pro rata cost of acquisition; Kansas City, Kansas, about 14 per cent; Independence, Missouri, about 5 per cent; and North Kansas City about 1 per cent.

"It would appear that the company is moving toward public ownership," Davis declared. "If that comes about when the city franchise terminates in 1957, or before that, it seems only fair that the whole community should have a part in the operation. The community is dependent on public transit."

SEATTLE voters may soon be called upon to approve one of two plans for subsidization of the deficit-ridden Seattle Transit System. The city transit commission requested that the city council put on the November ballot a proposal for a $2,000,000 general obligation bond issue to provide funds for enlarged terminal facilities and new coaches. The other plan, calling for establishment of a Seattle metropolitan transit authority with power to levy taxes to make up operating deficits, is expected to be submitted to the state legislature in January. It would be in the form of a state constitutional amendment, requiring approval by both the legislature and the electorate.

The Seattle Transit System has had operating deficits each month this year. The commission had estimated the deficit would reach $650,000 by the end of the year unless fares were boosted. The city council rejected a transit commission request that the transit system be relieved of a 2 per cent gross revenue tax. This levy yields about $200,000 a year and goes into the city general fund.

In a move to avert a threatened citywide bus strike, the Sacramento city council recently authorized the city manager, Bartley W. Cavanaugh, to proceed with negotiations to purchase busses and other facilities of the Sacramento City Lines. Cavanaugh suggested that the acquisition

might be financed through a loan from funds in the city employees' retirement system or possibly through a bond issue. City officials estimated the valuation of the system at approximately $750,000. It was noted, however, that it might be necessary for the city to ask the state public utilities commission to appraise the property and place a valuation satisfactory to the company and the city.

In another California development, the state commission, in granting Stockton City Lines a fare increase, criticized the company for its "inertia" in going after business. The commission directed the company to undertake an aggressive advertising and traffic promotion campaign designed to increase patronage. The Stockton company was also told to seek cooperation of civic and other groups as well as that of city officials in a program to increase patronage. Fare increase was about two cents in various categories instead of the four cents requested.

PRESIDENT Eisenhower vetoed one regulatory law affecting the transit situation in the city of Washington and suburban area. The dual-purpose enactment would have set up a special transit commission having jurisdiction over streetcar and bus lines operating between the District of Columbia and its Maryland suburbs. It would also have created a study commission to consider transit problems peculiar to the greater metropolitan area affected. Pointing out that the bill failed to include the equally important Virginia suburbs, President Eisenhower vetoed the bill as being inadequate for its own avowed purpose. Although in sympathy with the bill's objective, the President thought a better bill could be drafted.

Transit experts throughout the country have continued to sound the alarm over deteriorating transit conditions and to offer their proposals for doing something about it. W. H. "Billy" Spears, one of the industry's prominent publicists, told a recent meeting of the National Parking Association in Chicago that the splurging by Americans following the end of World War II on autos, television sets, and other durable goods has brought about a transformation of home and the life that goes on in it, plus a disease he calls autotoxemia —a scourge worse than yellow fever.

THE scourge, Spears said, "has killed, cripped, and injured over 10,029,760 people in the last five years," caused taxpayers to spend billions of dollars for widening streets and building superhighways, is strangling American cities, has merchants in hysterics and has forced apathetic downtown areas to fight for their lives Citing seven years of wrong answers in handling traffic congestion and the growing danger of traffic-caused civic bankruptcy, Spears urged revival of rapid street transit as an inexpensive prescription for the survival of downtown business areas.

Spears urged ousting of curb parkers on streets used by public transportation vehicles, downtown parking curbs, zoning of downtown streets for cars, busses, and pedestrians, and abandonment of further plans for downtown municipal garages and parking lots. He warned the parking industry membership that if they could accept the U. S. Department of Commerce prediction of 18,500,000 additional vehicles on the roads by 1960, it would not be long before anything more bulky than a motor scooter in downtown areas would be as out of date as a horse and buggy. To back up his prophecy, he pointed out that increased downtown parking facilities and superhighway improvements had only resulted in a new volume of traffic to further clog the streets.

COLONEL S. H. Bingham, well-known transit expert, who is executive director and general manager of the New York City Transit Authority, warned the Society for the Advancement of Management recently of dire transit crises in cities throughout the country because of soaring costs, increasing traffic congestion, and management problems. Like Spears, Bingham urged greater use of mass transportation systems and restriction of private cars in business areas to save cities from deteriorating physically.

In the meantime, he said, the transit systems and the railroads, which he described as essential services "now in great financial stress" because of outmoded regulations, steady loss of passengers, rising costs, and burdensome taxes, must be given assistance.

"The transportation system," he declared, "must be given an opportunity to function freely, free from traffic congestion, and free from archaic regulations that no longer apply to today's conditions." Favoring private management over nationalization, Bingham said "given half a chance, progressive private management can do a better job, and do it at a lower cost."

As a last resort, when it becomes impossible for a private operation to remain in business, and as an alternative to the usual pattern of government ownership and operation, Bingham recommends a new pattern which has come to be known as the "Bingham Formula"—a partnership between the government and the transportation system, with operation by the private management if it were shown to be competent. His plan "recognizes the necessity of expert and experienced management," Bingham said. "With the application of my formula, the transportation system does not burn all its bridges behind it. It leaves the door open for a return to private ownership and operation if at some time in the future economic conditions change sufficiently to make this possible."

This new kind of quasi-public transportation corporation, he said, would retain the efficiency of operation known in the best competitive industry and the financial and other advantages of community operation.

The Dilemma of Modern Transit Operation

"THE *question has been raised as to how, in cities where the cost is not spread among the taxpayers by reason of the operation being under public ownership or by reason of the city having guaranteed a private operator a minimum return, the mass transportation industry is to meet the problem of higher wage trends. Only time and experience can supply the correct answer to that question. It is obvious, however, that the unions representing transit employees must face facts and realize their members are employees of a depressed industry so cannot expect to earn the same wage rates as paid by prosperous industries, unless they choose to change their occupations and become employees of a prosperous industry.*"

—LOUIS MCC. RICHIE, Q.C.,
Counsel for The Grey Bus Line Company, Ltd., Moncton, New Brunswick, Canada.



The March of Events

Seeks Rate Rise from FPC

NATURAL GAS PIPELINE COMPANY OF AMERICA has filed a new rate schedule with the Federal Power Commission providing for an increase in its natural gas rates of approximately $10,700,000.

Joseph J. Hedrick, president, said $4,300,000 of the increase represented higher costs for gas to be paid by Natural Gas Pipeline to Colorado Interstate Gas Company, one of its suppliers, as the result of a new tariff filed by Colorado Interstate which will probably become effective, subject to refund, on February 1, 1955.

"A substantial part of the remainder of the proposed increase — namely, $3,550,000—reflects the effect on Natural's rates of the principles adopted by the FPC in its decision on April 15th in the Panhandle Eastern Pipe Line Company Case," Mr. Hedrick said.

Connecticut

Switch to CIO Rejected

THE Utility Workers Union of America, CIO, was defeated early this month in its attempt to oust the United Mine Workers' independent union and gain control of the union at the Hartford Gas Company.

Employees of the Hartford Gas Company, by a vote of 137 to 67, overwhelmingly rejected the CIO. The present contract between the United Mine Workers, District 50, and the company expires on September 30th.

Following the election both company and UMW spokesmen said negotiations for a new contract with UMW would begin.

Illinois

Stock Purchase Program

THE Commonwealth Edison Company recently filed a registration statement with the Securities and Exchange Commission in Washington covering 500,000 shares to be offered under its proposed stock purchase program for employees.

The Illinois Gas Company, a subsidiary, plans a similar program, involving 200,000 of its shares, and it also filed a statement with the SEC.

Willis Gale, chairman of Commonwealth Edison and the subsidiary, said all regular employees, regardless of job or pay, would be eligible to buy the stock through payroll savings. They could authorize payroll deductions to a maximum of 10 per cent of base pay. The savings would be used each April 15th and October 15th to buy stock at 90 per cent of the closing market prices on those dates.

The parent company has about 16,000 employees who would be eligible to buy stock and the gas subsidiary has about 2,000.

Maryland

Cut-rate Fares Begun

CUT-RATE fares of two tokens for 35 cents began on Baltimore Transit Company busses and trolleys early this month. The BTC on September 8th asked and received permission for the rate reduction from the state public service commission. The present fare of 18 cents a ride remained in effect for passengers who do not purchase tokens.

Under the terms of the recent request, the new token rates will remain in effect until January 10, 1955, or until the courts reach a decision on the BTC's appeal for still higher rates—perhaps 20 cents a ride.

In January, if the courts have made no decision, the BTC would have the choice of extending the token rates or of going back to 18-cent fares only. Douglas M. Pratt, president of the transit company, said service had been "materially slowed up" because of the time consumed in making change for the 18-cent fare.

Nebraska

Power Plan Turned Down

CONSUMERS PUBLIC POWER DISTRICT recently turned down a proposal for reorganization of Nebraska's power setup and reaffirmed its intention to build a steam-generating plant to help meet the state's growing electrical needs.

Proposals made by Platte and Loup Public Power districts "do not at this time appear sound and practical" to Consumers' board of directors, President H. G. Greenamyre of Lincoln said. Consumers' rejection was included in letters to Loup and Platte. The Loup-Platte resolution suggested the merger of Loup and Consumers districts to serve eastern Nebraska, with Platte set up separately to supply power in a section from Grand Island west through Deuel and Garden counties. The suggested reorganization was aimed at solving differences about who should build a $17,600,000 steam plant to bolster Nebraska's generating capacities. Consumers and the Nebraska Public Power System, made up of Loup and Platte, have announced intentions to build the plant.

New Jersey

Advocate Repeal of Antistrike Law

A REPORT recommending repeal of New Jersey's public utility antistrike law was submitted to Governor Meyner on September 9th by a special committee he appointed last January to study the issue.

Enacted originally in 1946 and since

amended, the New Jersey act provides for compulsory arbitration of labor disputes in public utilities where other settlement efforts fail and also provides for state seizure of struck utilities in instances threatening the public welfare.

Meyner's special study committee included three public representatives, three from industry, and three from labor. Eight of the nine members signed the majority report, asserting that such antistrike laws appeared "to be of doubtful constitutionality" and that the New Jersey law was more harmful than beneficial and "clearly detrimental to the process of collective bargaining."

New York

Fare Proposal Suspended

THE state public service commission recently suspended a proposal by Niagara Frontier Transit System, Inc., to increase its adult cash fares from 15 to 20 cents, with tokens to be sold at six for $1, effective October 3rd. A public hearing to consider the proposed fare increase was scheduled to be held September 21st.

The suspension order was adopted by a 3-to-1 vote, with Chairman Benjamin F. Feinberg and Commissioners Spencer B. Eddy and Paul E. Lockwood in the affirmative and Commissioner Bedenkapp in the negative.

In seeking to increase fares, the company reported a serious downward trend in the number of passengers carried and estimated that if such declines continued, and taking into consideration a recent $275,000 wage increase to employees, it would lose about $822,000 during the next twelve months under present fares.

Pennsylvania

Gas Rate Hearings Slated

THE state public utility commission is scheduled to open hearings in Harrisburg on October 13th on a $3,758,000 annual natural gas rate increase sought by the Equitable Gas Company, Pittsburgh.

Equitable proposed to put a $1,852,500 increase in effect August 10th and a second $1,905,000 increase on August 26th. The commission suspended both proposals for six months to next February 10th and February 26th.

Both rate increases are opposed by the city of Pittsburgh. The utility furnishes service to 225,000 consumers in Allegheny, Armstrong, Butler, Greene, Indiana, Washington, and Westmoreland counties.

Texas

Asks Gas Rate Boosts

THE Arkansas-Louisiana Gas Company recently asked for gas rate increases in the 25 northeast Texas towns it serves.

Pointing out that this is the first general increase requested by the company in the area in nearly a quarter-century, Company President A. H. Weyland explained that "gas service now costs most of our east Texas customers less than it did twenty-five years ago, but the price the company pays for natural gas has more than doubled in the last seven years."



Progress of Regulation

Common Carriers May Not Refuse to Cross Peaceful Picket Lines to Serve Shippers

A HARDWARE wholesaler being picketed by a labor union successfully appealed to the Georgia supreme court from a judgment refusing to enjoin common carriers from denying him pickup and delivery service. The court held that although the carrier had a contract with its union employees recognizing their right to refuse to cross a union picket line, it should have been enjoined from operating upon the state highways until it had restored to the shipper all services normally furnished.

Such carriers, it said, cannot escape their responsibility to the public of performing the duties assumed by them as common carriers by any such contract.

The carrier had filed a tariff approved by the commission providing that where strikes, picketing, riots, or other labor disturbances make it impracticable, unsafe, or impossible to render pickup or delivery service, such service will not be given. The carrier claimed that this relieved it from serving this picketed store. However, the court pointed out that the picketing had been orderly and that no violence, threats of violence, or other form of intimidation has been employed since the commencement of the strike.

Furthermore, there was no evidence indicating that it would be impracticable, unsafe, or impossible for the carrier to render such service. The court concluded that the facts of this case showed a plain case of discrimination by the refusal of the carrier to give the services required of it by law without just cause and, consequently, that the injunction should have been granted. *Beck & Gregg Hardware Co. v. Cook et al. 82 SE2d 4.*

Free Transportation to Test Public Need

CAPITAL TRANSIT COMPANY was authorized by the District of Columbia commission to conduct special operations between a terminal at a "fringe" parking lot and a downtown terminal in the city of Washington. The plan would permit the issuance of free transfers between vehicles operating over the proposed route and the company's intersecting lines at stops designated. This free service would be for an experimental period of not more than thirty days.

The company proposed to perform the special operations between the fringe park-

ing lot and the downtown terminal during morning and evening rush hours. District commissioners had established the parking lot, on which parking would be permitted without charge, for the purpose of improving traffic conditions by eliminating some traffic in the congested business areas.

The company stated that from this experimental survey it would appraise the cost of operations and the revenues that might be expected, and then would apply to the commission for fares that might be determined appropriate at the time. As stated in the decision:

> The commission is of opinion that the use of fringe parking lots will reduce downtown traffic and add materially to the convenience of mass transportation in the business areas, and that it will reduce the costs of such operations. Neither Capital Transit Company nor this commission is in possession of such statistical information as to indicate whether special transportation between fringe parking lots and downtown areas will meet the public need or will be accepted by the public to such extent as to justify special operations. The commission is of opinion, therefore, that in order to obtain such survey information the requested operation between the parking lot at South Capitol street and Firth Sterling avenue and a downtown terminal, with free transportation during the survey period, is in the public interest and should be approved.

Re Capital Transit Co. Order No. 4104, PUC No. 3397/12, August 17, 1954.

Reproduction Cost to Be Given Substantial But Not Exclusive Weight

THE Delaware supreme court modified a lower court order in a telephone rate proceeding. The court agreed with the lower court's action in remanding for the correction of various errors in the commission's calculation of income but disapproved the court's action "in taking over the functions of the commission and making its own independent valuation of the plant and its own determination of how much working capital was required." Reproduction cost as a measure of value received careful attention.

Charitable Contributions

The first question considered by the court was that of charitable contributions. The commission had excluded them from the company's expense account. The lower court reversed. The supreme court did not disturb the lower court's action but refrained "from either approving or disapproving what the learned judge said on the subject." The court made the following comment:

> A real question may lurk here, as to whether the officers and directors of a utility have the right to commit it to substantial charitable undertakings and then simply to tax the consumers with the cost of their generosity. But in this case we are not brought to grips with the issue, for the amount of charitable contributions here involved was not enough to have any effect upon the rate schedule.

Tax Refund

The second point of appeal pertained to a $15,000 income tax refund. The commission refused to follow the company's view that this was a nonrecurring item

and consequently not properly includable in a study of anticipated earnings. The lower court held that the commission's view of this sum as typical income was wrong. The supreme court accepted the company's contention.

Rate Base

The determination of the rate base was considered the most troublesome issue in the case by the higher court. Working capital requirements and the fair value of the property were in dispute.

Working Capital

The company contended that it needed more than one-third of a million dollars working capital even though its average cash balances during test periods were less than $150,000. The state's position was that a study of a similar Maryland company indicated that no working capital was required because of income tax accruals and the time lag between collections from customers and the payment date of company obligations, including taxes. The commission adopted the state's view while the superior court reversed and directed that an allowance of $100,000 be made.

The supreme court affirmed the lower court's ruling with this comment:

> The figures submitted in behalf of the state were based upon the experience of a different concern, and while there is some evidence of supposed similarity of that company's situation with this company's, and the question as to whether the state's testimony was at least circumstantial evidence is a close one, we think that on this question of evidence there is adequate basis for a direction by the superior court that an allowance be made for working capital.

Reproduction Cost

The court did not consider what it described as "the sharply controversial issue" as to whether the commission in fixing rates was forced to determine the fair value of the plant. The statute says that the commission could do it that way, and it did; so the question as to what else might have been done is moot.

The company pressed for a determination of fair value based entirely upon reproduction cost. The state argued for a rate base developed entirely from the company's investment in plant. The commission did not adopt either view. Its finding was in excess of that sought by the state but considerably less than the company's figure.

The lower court's views were summarized by the supreme court in these words:

> Fair value, as the learned judge explains, in such statutes means "present" fair value. He found as a fact that there was currently a state of great inflation which "gives no indication of subsiding materially in the next few years." Thereupon he concluded that "a reproduction cost estimate is designed to meet the very situation here presented, and no other method, except original cost trended, which is about the same as reproduction cost, has been suggested which can deal with this problem."

The supreme court ruled that the error in the lower court decision was that instead of giving reproduction cost "substantial" weight, "exclusive" weight was given to this measure of value. The learned judge, the court said, took the company's reproduction cost study and simply scaled it down 10 per cent to compensate for possible errors.

Prudent Investment

After tracing the history of utility rate base determination from Smyth *v.* Ames (1898) 169 US 466, to the Hope Natural

Gas Case (1944) 320 US 591, 51 PUR NS 193, the court concluded that anything which reasonably bears on the question of fair value should be considered, including both reproduction cost and prudent investment. The court appeared to emphasize the importance of prudent investment in this comment:

> And where ordinary considerations of fair play are to be considered, it would be difficult to conceive of any set of circumstances in which the amount of money wisely and in good faith invested in a utility's plant would not be a factor of the first order of importance in fixing rates.

Re Diamond State Teleph. Co. July 23, 1954.

Commission Need Not Make Return Finding Prior to Ordering Bus Route Extension

THE Wisconsin supreme court affirmed a lower court decision approving a commission order directing a transportation company to extend a bus route. The principal basis for the company's appeal was that, since the extension would produce a net operating loss, a finding should have been made that the extension would not impair the earnings so as to prevent an adequate or fair return.

The court held that a statute requiring a finding as to return in connection with an extension of street railway service does not apply to a motorbus route extension. The gain or loss from a bus route extension is only one factor to be considered by the Wisconsin state commission.

Finally, the court indicated that the effect of the extension on return would be better considered in a separate proceeding. It said:

> Whether the net loss to the corporation occasioned by operation of such extension is or is not such as would prevent appellant from receiving an adequate or fair return on its investment is a question to be decided upon its application for an increase in rates.

Milwaukee & Suburban Transport Corp. v. Wisconsin Pub. Service Commission et al. 64 NW2d 856.

Specific Finding of Value Unnecessary for Commission Approval of Utility Sale

THE Kentucky court of appeals upheld a commission order approving the sale of a water system to a newly formed water company. In doing so, the court reversed a lower court judgment setting aside the order.

During the course of the commission hearings certain cities had intervened and offered to buy the system. On appeal to the lower court they had claimed, among other things, that the public interest would best be served through municipal ownership. The lower court judge said that the cities should have been given an equal and adequate opportunity to acquire the system.

However, the basis assigned by the judge for setting aside the order was the statement in the order that the commission was not finding the value of the property and, therefore, the order was unreasonable.

Specific Finding of Value

The court of appeals did not ascribe the same meaning as did the lower court to this statement. It concluded that the statement was intended merely as a warning to the parties that the sale price would not be taken as conclusive for rate base purposes. It was said to be apparent that the commission did give general consideration to the value of the property in relation to the price offered, at least to the extent of determining that the transaction was not unreasonable or impracticable.

In passing upon the ability of the purchaser to provide adequate service, the commission necessarily considered its financial structure and the probabilities of its being able to operate successfully from a financial standpoint. The court of appeals concluded that it was sufficient for the commission to make a broad determination that the price was within the general range of a fair price. To require the commission to fix a specific valuation on the property would, in the court's opinion, unduly hamper and restrict the commission in later regulation of rates.

Commission Jurisdiction over Utility Sales

It was argued on appeal that the commission had no jurisdiction over sales of utility systems. In rejecting this argument, the court conceded that the statute does not expressly confer such jurisdiction upon the commission. However, it concluded that this jurisdiction may be implied necessarily from the statutory powers of the commission to regulate utility service.

The court pointed out that the commission is charged with the responsibility, and vested with power, to see that service is adequate. Consequently, where an existing company proposes to sell its system, the commission must have an opportunity to determine whether the purchaser is ready, willing, and able to continue providing adequate service. The power to do this is necessarily implied from the statutes.

The court held that this implication could not be extended, however, to include commission power to determine whether public ownership is more beneficial than private ownership, and to determine under whose ownership the lowest rates may be achieved.

These questions, the court said, address themselves to basic public policy, upon which an express legislative declaration is required.

From a mere grant of power to regulate rates and service, the court refused to imply a declaration of policy that not only must rates be reasonable, but the type of ownership that will provide the lowest rates is the only type of ownership that will be permitted. *Kentucky Pub. Service Commission et al. v. Cities of Southgate, Highland Heights et al. 268 SW2d 19.*

Composite Gas Meter Reading Denied Housing Project

THE Louisiana commission dismissed a housing corporation's petition for an order requiring a gas company to send it one bill based on one meter reading for all gas used by residents of the project. The corporation indicated that it paid all the bills charged to the 223 residents of the project and that the rents for the units included gas service. The corporation contended that it was actually the only customer served in the project and should receive but one bill for all gas used in the project.

The commission pointed out that if it granted the petition, the same privilege would have to be granted to literally

hundreds of housing projects within the state. Other reasons for the dismissal of the petition are apparent in this statement:

> . . . the housing development under consideration is not unique and the mere fact that the housing corporation pays the utility bill and takes that fact into consideration in fixing the monthly rental for the apartments does not alter the situation in so far as the metering and billing for natural gas service is concerned. Further, the defendant has a considerable amount of investment in pipeline, distribution system, regulators, and meters at this project and is entitled to a reasonable and fair return on that investment.

Shreveport Housing Corp. v. Arkansas Louisiana Gas Co. No. 6538, Order No. 6494, June 10, 1954.

Wholesale Electric Rate Approved Notwithstanding Contract with Utility Engaged in Retail Distribution

THE Federal Power Commission approved a rate increase for electric energy sold for resale in interstate commerce. No adjustment was made to test-year figures to reflect reduced tax payments which would be made during a period of accelerated amortization of defense facilities, nor was any adjustment made to reflect increased operating expenses brought about by wage increases effective in the middle of the test-year period and reflected only for part of the year. The commission said that no evidence had been introduced to support the adjustments "because they would be too small to affect the conclusions predicated upon the use of the unadjusted test-year figures."

Cost-of-service Controls

The commission tested the reasonableness of the new rates by the cost-of-service method, notwithstanding a contention by the distributing company that a 1948 contract rate which had been negotiated under competitive conditions should be retained as the reasonable rate.

The commission pointed out that a public utility cannot by contract place its rates beyond the reach of regulation by public authority. As a further answer the commission stated that the competitive sources of supply which the consumer claimed were passed over in preference to the company seeking the rate increase were regarded by the consumer as so unacceptable that the seller became the only feasible source.

No Discrimination Found

The question as to whether the new rate would be unduly preferential or discriminatory was disposed of by the commission by showing that it was substantially the same as the rate which the wholesale company had filed for the only other service which it rendered involving a firm sale of energy in interstate commerce.

The two services, the commission continued, were generally comparable except that the cost of rendering the other service was roughly one-seventh less. Disregarding this difference, the commission noted that the record did not indicate that the other rate exceeded the cost of service, causing it to bear a disproportionate share of the total expenses or indicate that ultimate consumers affected by that rate were at a competitive disadvantage as compared with ultimate consumers served by the distributing company.

Rate of Return

Finally, consideration was given to the return which the 1948 contract rates would bring, what the wholesale company sought, and what would be a reasonable return allowance. The commission's conclusions were:

> However, we may point out that if a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful. For none of the evidence in this record warrants a finding that any rate would be reasonable that would produce a return of substantially less than the 4.75 per cent resulting from the proposed rate, which is the minimum PG&E is willing to accept. Notwithstanding the stipulated fact that 5½ per cent is generally a reasonable rate of return on the electric utility business of PG&E, the company is willing to accept a rate producing a 4.75 per cent return from this particular part of that business as not unreasonably low.

Minority View

Commissioners Doty and Smith, in a dissenting opinion, referred to the majority opinion as consisting of "varied, and to a considerable degree, labored stages" and supported by "purely negative findings." The minority agreed that the contract could be modified by a regulatory body for adequate cause but offered detailed argument that such cause was not apparent in the instant case and that the contract rate therefore should have been allowed to stand. *Re Pacific Gas & E. Co. Docket No. E-6482, Opinion No. 270, June 16, 1954.*

Other Important Rulings

Telephone Service Restored. The California commission ordered the restoration of telephone service which had been discontinued because of illegal use of the facilities by the subscriber's wife where his wife had paid the legal penalty for the illegal activities she had conducted and the subscriber needed the service in the conduct of his lawful business. *McGarragh v. Pacific Teleph. & Teleg. Co. Decision No. 50436, Case No. 5549, August 17, 1954.*

Carrier Limited to Certificate Routes. The Kentucky court of appeals, in enjoining a carrier from transporting whiskey to certain points, commented that a carrier holding a transporter's license for distilled spirits, which license is conditioned upon the transporter having a common carrier certificate, may transport such distilled spirits only between the points and over the routes designated in its certificate. *Medley v. Edward Torstrick Transfer Co. 267 SW2d 534.*

Protection against Competition. The supreme court of Illinois, in affirming a commission order authorizing competing bus service, held that a carrier which was not the first in the field to transport passengers by bus and had made no substantial investment in the development of its business was in no position to claim benefits of the rule protecting pioneer utilities against competition and, therefore, the commission was not required to find that the service rendered by the existing carrier was inadequate or unsatisfactory, to give that carrier an opportunity to supply the needed service, or to find that it had failed or was unable to provide additional

service. *Eagle Bus Lines, Inc. v. Illinois Com. Commission et al. 119 NE2d 915.*

Injunction against Railroad Rate Order Denied. An application for an injunction against enforcement of an Interstate Commerce Commission order reducing railroad rates was denied where six of the eleven members of the commission voted for approval of the reduced rates and only one of the five dissenting members directly found that the railroads were not entitled to some relief. *National Auto. Transporters Asso. et al. v. United States et al. (1954) 121 F Supp 289.*

Intermediate Points Eliminated. An airline was authorized by the Civil Aeronautics Board to eliminate certain cities as intermediate points on its route where the cost of serving such points was too great in relation to the small volume of traffic. *Re Continental Air Lines, Inc. Docket No. 5869 et al. E-8493, July 2, 1954.*

Municipal Plant Excluded from Co-operative's Area. The Indiana commission refused to allow a municipal electric utility to serve an area assigned to a co-operative. *Re City of Crawfordsville, No. 25057, June 17, 1954.*

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Appendix

Important addresses on legal, economic, financial, and other problems, delivered before the Public Utility Law Section of the American Bar Association at Chicago, August 16-18, 1954.

Report of Standing Committee

By D. BRUCE MANSFIELD*

FOLLOWING the precedent heretofore established, the summary preceding the body of the report was prepared by the chairman of the standing committee and as chairman I assume the responsibility for it. We are departing from precedent in that the formal presentation of developments during the year in the field of public utility law will be limited to these remarks of the chairman of the standing committee.

Of perhaps greatest significance this past year in the field of public utility law have been the legislation, court and commission decisions concerned with state and federal jurisdiction.

State and Federal Jurisdiction

ON August 7, 1953, a new subsection[1] to § 202 of the Federal Power Act was approved by the President. By this amendment persons or companies owning or operating facilities for importation or exportation of electric energy were exempted from regulation under Part II of the Federal Power Act where none of the energy transmitted across the international boundary is transmitted into any state other than that from or to which the international transmission is made.

Subsequent to the adoption of this amendment Detroit Edison Company completed two international interconnections—one between Detroit and Windsor, Ontario, the other between Port Huron and Sarnia, Ontario. Through these transmission lines the Detroit company later was able to give valuable emergency power in timely fashion to the Ontario Hydro Commission following a serious breakdown of generating units in Canada.

On March 27, 1954, the President approved an amendment to the Natural Gas Act[2] known as the "Hinshaw Bill." This amendment exempts from Federal Power Commission jurisdiction any person engaged in the transportation or sale for resale of natural gas received by such person from another person within or at the boundary of a state if all the gas so received is entirely consumed within such state, provided that the rates, service, and facilities of such person be subject to regulation by a state commission. Congress declared that the regulation of such companies is primarily a matter of local concern, and subject to regulation by the several states. This amendment overrules and nullifies the holding in Federal Power Commission *v.* East Ohio Gas Co.[3]

THE commission has taken the position that the Hinshaw amendment is not self-executing. On July 7, 1954, it issued an order prescribing the procedure to be followed by natural gas companies in making application to qualify for exemption.[4] The amendment to the General Rules and Regulations became effective July 7, 1954.

The President issued a statement saying he had signed the Hinshaw Bill because of his conviction that the interests of the individual citizen would be "better protected when they remain under state and local control than when they are regulated or controlled by the federal government," and that he would "support state regulation of functions and matters

*General counsel, Ohio Edison Company, and chairman of the ABA Standing Committee to Survey and Report As to Developments during the Year in the Field of Public Utility Law. Editor's note: To avoid duplicate reporting, this summary by Chairman Mansfield has been condensed so as to omit repetition of certain text and materials already published in the printed report of the Standing Committee to Survey and Report As to the Developments during the Year in the Field of Public Utility Law.

which are primarily of local concern whenever possible and when not contrary to the national interest."[5]

On April 27, 1954, the President approved an act,[6] known as the "O'Hara Bill," exempting from Federal Communications Commission jurisdiction small telephone companies using radio facilities.

Pending Matters

In an effort to eliminate duplicate regulation the Securities and Exchange Commission submitted for comment and public hearing a proposal to amend its competitive bidding rule under the Holding Company Act of 1935—Rule U-50—to exempt from competitive bidding security issues of operating utility subsidiaries of registered holding companies when the issue and sale of such securities are subject to the jurisdiction of the regulatory commission of the state in which such subsidiary is organized and doing business.[7] Extensive hearings, commencing on February 18th, have been held but as yet the commission has announced no conclusion.

Offsetting the developments already described favoring states' rights and state as against federal regulatory jurisdiction was the Supreme Court's decision announced on June 7, 1954, in Phillips Petroleum Co. *v.* Wisconsin et al.[8]

Time magazine quoted Texas Governor Allan Shivers as saying with respect to this decision: "This is one of the greatest invasions of states' rights the courts have ever announced."[9]

It will be recalled that the 81st Congress passed the Harris-Kerr Bill[10] in order to make clear its intention that the Federal Power Commission was not authorized to regulate independent producers and gatherers on their sales to interstate pipeline companies, only to have the measure vetoed by President Truman. It has been reported that Phillips has or will petition for a rehearing. In the meantime, on July 15, 1954, HR 9923 was introduced by Mr. Rogers of Texas, which provides for amending § 1(b) of the Natural Gas Act by adding the following sentence:

> For the purposes of this subsection the term "production or gathering of natural gas" includes the sale of natural gas by the person engaging in its production or gathering, if such person is not engaged in (or affiliated with any natural gas company engaged in) the transmission of natural gas to consumer markets in interstate commerce or the distribution of natural gas to the ultimate consumers.

In the meantime, too, the Federal Power Commission on July 16, 1954, issued its order prescribing regulations to govern the estimated 4,100 independent producers and gatherers of natural gas which may come within the category subject to Federal Power Commission jurisdiction.[11] The new rules and regulations apply to transactions and operations conducted on and after June 7th, the date of the court's decision. Sales contracts which were in effect as of that date are to be filed with the commission by October 1st. No increase in these rates can be made unless filed with the commission, which can suspend the proposed higher rates pending hearing and decision. Further, producers are required to file by October 1st, applications for certificates authorizing the transportation and sale of natural gas in interstate commerce.

Rates

Perhaps of most significance in the field of rate making was the decision of the Federal Power Commission on April 15, 1954, in the Panhandle Eastern Pipe Line Case,[12] wherein the commission departed from its "rate base" method of valuing natural gas which the company itself produced. The commission excluded from the rate base the producing and gathering facilities and allowed as an operating expense an amount reflecting the weighted average arm's-length payments for identical natural gas in the field where it is produced.

Companion bills are before the Congress which would make the original cost formula mandatory with respect to gathering and production facilities.[13] Senator Ferguson's bill, which is very brief, would amend § 6(a) of the Natural Gas Act by adding the proviso:

> That the value for rate-making purposes of gas reserves held by any natural gas company shall in no case be deemed to exceed the actual original cost of such reserves to such company.

Following the decision in the Phillips Case Senator Ferguson requested "indefinite post-

ponement" of hearings on his bill, explaining that the measure needed "considerable more study in the light of the decision."[14]

On the same day that it announced its decision in the Phillips Case the Supreme Court denied a rehearing in the case of Kansas State Corp. Commission *v.* Federal Power Commission.[15] The court had earlier on January 4, 1954, denied certiorari.[16] This was the case in which the court of appeals for the eighth circuit on July 20, 1953, had reversed the Federal Power Commission's decision fixing rates for the Northern Natural Gas Company.[17]

The effect of the Supreme Court's refusal to review the case is to now require the commission to re-examine its application of the cost-of-money theory in the rate of return determination. That the commission may already have re-examined such theory seems apparent from its statement in Re United Fuel Gas Co.[18] decided on August 7, 1953, where it allowed a natural gas company a 6¼ per cent rate of return.

SPEAKING before the Edison Electric Institute at Atlantic City on June 3, 1954, Chairman Kuykendall, Federal Power Commission, said, in part:

> The commission has been criticized for allegedly paying too much attention to the cost of money in arriving at a fair rate of return. Cost of money, while not the exclusive measure of the rate of return, is certainly a necessary ingredient thereof.

On May 13, 1954, S 1461, a proposal to add a new section, to be known as § 15(b), to the Interstate Commerce Act, was sent back by the Senate to the Committee on Interstate and Foreign Commerce.[19]

Accelerated Amortization

ACCELERATED amortization of emergency facilities under § 124A of the Internal Revenue Code, both with respect to accounting and rate making, was a subject of importance during the year.

On December 4, 1953, the Federal Power Commission, in its opinion under the Natural Gas Act and the Federal Power Act,[20] held that the accelerated amortization of emergency facilities should not affect the annual charge for depreciation for rate-making purposes.

On April 21, 1954, the Federal Power Commission, by amendment to the Uniform System of Accounts for Natural Gas Companies,[21] prescribed the accounting treatment to be accorded federal income taxes in relation to accelerated amortization. Each year during the write-off period there is to be charged to a special account, numbered and entitled "Account 507-1, Provision for Deferred Federal Income Taxes" to appear as a separate item in the income statement directly following Account 507, Income Taxes, an amount equal to the amount by which federal taxes based on income for that year are deferred by reason of the accelerated amortization, with concurrent credit to a special balance sheet account to be numbered and entitled "Account 258.1, Reserve for Deferred Federal Income Taxes" to appear as a separate item in the balance sheet directly following "Account 258, Other Reserves."

IN each year following the period of accelerated amortization until the end of the service life of the emergency facilities, or until the exhaustion of the Reserve for Deferred Federal Income Taxes, whichever occurs earlier, there shall be debited to such reserve, with concurrent credit to a special income account entitled "Account 507-2, Federal Income Taxes Deferred in Prior Years," an amount equal to the increase in taxes for that year resulting from the fact that depreciation is no longer available as a deduction for federal income tax purposes. Any balance remaining in the reserve after the retirement of the property can be disposed of only as directed by the commission.

This same accounting treatment had been prescribed about a week earlier by the commission on April 15, 1954, for Panhandle Eastern Pipe Line Company.[22]

The Federal Power Commission has not as yet prescribed accounting treatment under the Federal Power Act.

Economic Depreciation

THE principle designated "economic depreciation" has been advocated with varying degrees of success, mostly minor where at all, before regulatory commissions as a method for compensating, in part, for attrition of capital due to inflation. This principle was, however, specifically rejected by the North Carolina supreme court in North

Carolina Utilities Commission *v.* Carolina Teleph. & Teleg. Co.[23]

Similarly, the Alabama commission rejected a company's claim for depreciation accruals based on reproduction cost.

Zoning

BECAUSE of the increased activity of planning commissions and zoning boards, indirect regulation of public utilities by such commissions and boards will be the inevitable result unless public utility commission jurisdiction is deemed exclusive or paramount or unless statutory power of eminent domain is held to be unaffected by local ordinances.

In Jennings et al. *v.* Connecticut Light & P. Co.[24] under a statute giving the local authorities control over the placing, erection, and maintenance of "wires, conductors, structures, or apparatus" but excluding "so much of the operations, plant, building, structures, or equipment of any public service company as is under the jurisdiction of the public utilities commission," the supreme court of Connecticut held, in answer to questions forwarded to it by the lower court, that the power company must obtain permission from the zoning commission, which acts as a special agency of the state, for permission to erect a plant, and that any order of the zoning commission could be appealed to the public utilities commission. The court ruled that the statute could not be construed as conferring on municipal zoning authorities exclusive power to regulate or prevent the location of a utility structure within municipal boundaries, since if so construed the utilities commission would be powerless to compel a utility to render adequate service.

In Duquesne Light Co. *v.* Township of Upper St. Clair,[25] the Pennsylvania supreme court affirmed a decree restraining the township and its officers from enforcing a zoning ordinance against the power company.

Federal-Aid Highway Act of 1954

ON May 6, 1954, the President approved the Federal-Aid Highway Act of 1954.[26] Considerable testimony was heard from utility company representatives concerning the heavy financial burden placed upon utility companies when reconstruction or modernization of highways requires that their facilities be moved from their prior location on the highway right of way. The utilities were seeking legislation to be included in the act which would require that they be reimbursed for relocation of their facilities, either wholly or in part from federal funds.

While the act does not provide for such reimbursement § II directs the Secretary of Commerce to make a study in co-operation with state highway departments and other interested parties relative to the problems posed by necessary relocation and reconstruction of public utility services resulting from highway improvements authorized by the act and a report made to the President for transmittal to the Congress not later than February 1, 1955.

Financing

THE wide fluctuation in money rates during the last twelve months affected the financing programs of many companies. Interest rates began to decline in June after having risen during 1953 to heights not experienced for many years. This decline is making it possible to refund issues sold earlier in 1953. The stringency of the money market during this period was reflected in efforts of some institutional purchasers to restrict the callability of new issues sold at the higher rates. The Securities and Exchange Commission, however, expressed "strong disfavor" over partial or total noncall features. In two instances the commission, while approving issues having partial call features which had been negotiated before its views became public, announced its opposition to such provisions in the future as "undesirable" because they might tend to "lack of economies in the raising of capital."[27] It is probable that, notwithstanding the easing of money rates, the issue has not been put permanently to rest.

Several companies rejected bids received pursuant to Rule U-50 on the ground that money cost was too high. In May, 1953, Arkansas Louisiana Gas Company rejected two bids designating 5 per cent and 5⅛ per cent, respectively, for a $35,000,000 issue of 20-year first mortgage bonds. After obtaining interim bank financing, the bonds were sold privately in September on a 4½ per cent basis.[28] A somewhat different course was followed by Michigan Consolidated Gas Company. In June the company rejected the single bid received for $20,000,000 of 25-year first

mortgage bonds. The bid specified a 5 per cent rate at 100.125. Reoffered competitively late in January, the company received four bids, the highest being for 3⅜'s at 100.9799.

During the year the reconstituted Securities and Exchange Commission made important progress in simplifying procedures and reporting requirements. Revisions of Form U5S,[29] the annual filing for registered companies, and U-13-60,[30] the annual report for mutual and subsidiary service companies, have been promulgated. The commission also streamlined the procedures for clearing the results of competitive bidding under Rule U-50 and the requirements under the Securities Act by eliminating the need of obtaining orders after the filing of a price amendment with the results of the bidding, thereby making it possible for the issuer to award the issue immediately and for distribution to begin promptly.[31]

Rule U-70, prescribing the banking relationships of officers and directors of registered holding companies and subsidiaries, was given a general revision and submitted for comment.[32] A revised rule has not yet been promulgated.

One other proposal should be mentioned. This was a proposal supported by several registered holding companies to modify Rule U-45(b)(6). The rule governs the allocation of consolidated income taxes among companies in public utility holding company systems. The present rule, of many years standing, in effect credited the operating companies with reductions in taxes on consolidation resulting from the expenses and interest charges of the parent and with the consequences of loss operations elsewhere in the system. The proposal, which was at least temporarily put to one side after public hearing, would have preserved to the parent company some portion of these savings.[33]

This résumé of the year's developments has been far too long. Yet much more could be said about those cases in which commissions have, in attempts to minimize rate increases, redefined rate base and expense concepts, cases dealing with fuel and other escalation clauses, and many others. Reference is made to the printed report of the standing committee for information on these and other matters. Matters not covered in the report, including the present administration's power policy and the amendments to the Atomic Energy Act perhaps should have been mentioned. Where to draw the line has been a difficult task. Nevertheless, there must be a stopping point.

This concludes the formal presentation of the chairman of the standing committee. I appreciate very much having had the opportunity of being here and making this oral presentation.

Footnotes

[1] 16 USCA § 824a (f).
[2] Public Law 323, 83rd Congress, 68 Stat 36, 15 USCA § 717 (c).
[3] (1950) 338 US 464, 82 PUR NS 1.
[4] No. 7357, Docket No. R-136, July 7, 1954.
[5] PUBLIC UTILITIES FORTNIGHTLY, Vol. 53, No. 8, April 15, 1954, p. 508.
[6] HR 6436.
[7] HCA Release No. 12217-X, November 25, 1953.
[8] (1954) 347 US 672, 3 PUR3d 129.
[9] *Time*, Vol. LXIII, No. 25, June 21, 1954, p. 94.
[10] HR 1758.
[11] Docket No. R-138, Order No. 174.
[12] Re Panhandle Eastern Pipe Line Co. 3 PUR3d 396.
[13] S 3178, HR 8605, the "Ferguson-Oakman bills."
[14] As reported in PUBLIC UTILITIES FORTNIGHTLY, Vol. 54, No. 2, July 22, 1954, p. 106.
[15] (1954) 74 S Ct 862.
[16] (1954) 74 S Ct 307.
[17] Kansas State Corp. Commission *v.* Federal Power Commission (CA8th 1953) 1 PUR3d 10, 206 F2d 690.
[18] 100 PUR NS 405.
[19] Editor's note: The bill died with the adjournment of the 83rd Congress, 2nd Session.
[20] 2 PUR3d 41.
[21] 3 PUR3d 91.
[22] Re Panhandle Eastern Pipe Line Co. 3 PUR3d 396.
[23] (1954) 3 PUR3d 123, 80 SE2d 643.
[24] (1954) 103 A2d 535.
[25] Nos. 171, 173, May 24, 1954, 4 PUR3d 358.
[26] HR 8127, Public Law No. 350.
[27] Re Arkansas Louisiana Gas Co. (SEC) Act HCA Release No. 12134, September 14, 1953 ($35,000,000 first mortgage 20-year bonds, not redeemable for ten years); Re Indiana & Michigan Electric Co. (SEC 1953) 3 PUR3d 231 ($6,000,000 preferred stock, not redeemable for three years).
[28] Id.
[29] HCA Release No. 12430, March 29, 1954.
[30] HCA Release No. 12287, December 30, 1953.
[31] HCA Release No. 12298, January 13, 1954.
[32] HCA Release No. 12242X, December 8, 1953.
[33] HCA Release No. 12206-X, November 9, 1953; withdrawn, HCA Release No. 12288, December 30, 1953.

An Electric Rate Case

By CHARLES A. BANE*

THE marked feature of the year 1953-54, in so far as electric utilities are concerned, has been the widespread need and application for rate increases. The inflationary forces at work since World War II drove the costs of doing business for an electric utility to new high levels—and these forces showed their particular effects on those items of cost which constitute the principal components of expense for an electric utility: fuel, taxes, labor, and over-all construction costs.

It was precisely because of these forces that Commonwealth Edison Company, an electric utility serving electricity in the city of Chicago and northern Illinois, filed in the middle of 1953, for the first time in its entire history, for a general rate increase. I should like to discuss a few aspects of the proceeding in the belief that they represent problems common to all rate proceedings involving electric utilities throughout the United States.

A rate proceeding is instituted in Illinois by the filing of new rate schedules with our regulatory body, Illinois Commerce Commission. The commission then has power to suspend the new schedules for a total period of approximately eleven months. At the end of that time, the new proposed rates go into effect, or, in advance of that time, the new rates or other rates (which could be the existing ones) are found by the commission to be fair and reasonable and are ordered into effect. In the case of the Edison Company the new rate schedules were approved some seven months after their filing.

THE company and its counsel were convinced that it is a fundamental error in a rate proceeding to attempt to combine reform of rate schedules with a rate increase proceeding. Consequently, the Edison Company's proposals were for an across-the-board increase, averaging, as nearly as possible, 6½ per cent for each class of customer. One exception was made with respect to residential and small commercial customers. Those customers had not, prior to the filing, been subjected to a fuel clause, unlike large commercial and industrial customers. In its rate increase filings, the Edison Company proposed an across-the-board fuel clause, applicable to all customers and to all kilowatt-hours.

Furthermore, since the large commercial and industrial customers had been subjected to a fuel clause which had been operative since 1946, the new across-the-board fuel clause was based upon the level of the cost of fuel at the end of World War II. This proposal, of course, meant a substantial immediate increase in rates to residential and small commercial customers, though not so large as would be the case had the Edison Company not had substantial quantities of boiler gas available to it. Taking account of the fuel clause increase, the further increases requested were then spread equally among all classes of customers by proposed increases in the energy charge blocks.

THE result was that the immediate proposals imposed somewhat greater increases, percentagewise, on the residential and rural customers than on the large commercial and industrial. But if you took account of the increases imposed theretofore on large commercial and industrial customers, the percentage increases for all classes were about the same.

This feature of the filing was heatedly attacked by representatives of residential interests, including the city of Chicago. Nevertheless, it was approved by our commission, the commission thereby establishing to our mind the propriety of equal treatment of all customers in so far as fuel adjustments are concerned. One commissioner dissented, not on the ground that the increased revenues produced by the fuel clause were not justified, but because of his belief that a fuel clause represents an abdication by the commission of its control over utility rates.

The Edison Company in its filing proposed across-the-board increases not only for its rate customers, but also for its special contract customers. This was done by petition in which the precise variation requested in the contract was set forth. The commission denied motions to strike made by several of the contract customers, holding (as indeed is

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obvious) that its control over rates established by contract is as great as its control over rates embodied in rate schedules; and that a variation ordered in a contract does not represent an unconstitutional impairment of its obligation, since all contracts with utilities are taken to be made subject to the overriding authority of the regulatory commission.

WITH respect to rate base, Illinois is a fair value state. Unlike Ohio, reproduction cost is not to be the standard for determining a rate base, but it is a factor which our supreme court says the commission must take into account, along with all other relevant factors, in arriving at a fair value rate base. The Edison Company presented its reproduction cost study principally upon the basis of trending, by use of the Handy-Whitman Indexes; and the results were confirmed by spot-pricing and experienced judgment applied by expert engineers. Accrued depreciation for reproduction cost purposes was presented on the basis of observation. The results of the reproduction cost study showed a value about 50 per cent higher than the original cost depreciated of the Edison Company properties.

The commission had no difficulty in accepting a reproduction cost study so prepared, but it used an interesting technique with respect to fair value. In certain instances our commission, in determining fair value, has performed a *weighting* operation, ranging from approximately 50-50 up to two-thirds for reproduction cost and one-third for original cost. The exact percentages have not been made entirely clear, and of course the commission has stressed that it is not an automatic, arithmetical computation. In the Edison Case, the company urged in its brief that the commission need not find a precise or an exact fair value, but could rather make a "not less than" finding. This was so because by capitalizing the revenues which would arise from the proposed increases on the basis of the rate of return which had been urged, the result was a rate base which was in fact just about at original cost. This demonstrated, the company argued, that its requests were reasonable no matter what fair value was found. The commission adopted this technique in its order, and consequently did not find it necessary in the Edison Case to weight reproduction and original cost, and thereby arrive at a fair value.

WITH respect to rate of return, the company used as its expert witness an adherent of the cost-of-money school, but one who believes that it is a fundamental error in rate making to equate cost of money with fair rate of return. The witness was Dr. James C. Bonbright, a professor in the School of Business Administration at Columbia University and a recognized expert in the field of utility rate making. I might add incidentally that Dr. Bonbright has by no means changed his views that fair value is not an appropriate rate base, and that it should be original cost or prudent investment; but he nevertheless believes that if you are in a fair value state, and competent legal authority has stated that the rate base is to represent fair value, then it is intellectually dishonest to trim the rate of return so as to come out with the same result as would be achieved if a higher rate of return were applied to an original cost base. In Dr. Bonbright's view the purpose of a rate of return is to preserve the base which competent legal authority has said is to be preserved, and though in his view that base should be original cost or prudent investment, he is of the opinion that the fair value base must be preserved in those states where fair value is the legal standard.

Dr. Bonbright urged for the Edison Company a rate of return of 6 per cent, having found that the "bare-bones" cost of capital for the company was 5.63 per cent and that the remaining three-eighths of one per cent was necessary as an allowance over and above the "bare-bones" cost. In its order, the commission found that a fair rate of return for the Edison Company was 5.8 per cent for its electric operations.

AN interesting technique was successfully asserted with respect to working capital. The company argued against any deduction for tax accruals, although it was willing to offset tax accruals against its requirements for minimum bank balances. Operating income was also credited in the test-year computations with an additional amount representing the average return from investment in government bonds of the amount of tax accruals over and above the amount required for minimum bank balances.

With respect to going value, the company made no specific claim, but did present evidence that it existed and asked the commission to bear that factor in mind in reaching its final conclusions. This technique was likewise adopted with the concept of economic depreciation, the necessity for which was testified to by Leonard Spacek of Arthur Andersen & Co. Again no specific allowance was requested, but the commission was asked to bear in mind the factor of economic depreciation in reaching its conclusions.

I MIGHT add, if I do not thereby poach too far on the preserves of Mr. McDugald, who will speak on developments in the gas industry, that the Edison Company also operates a gas distributing business in northern Illinois, outside Chicago, and it coupled its electric rate increase proceeding with a gas rate increase proceeding. The evidence was, of course, presented so that each utility operation stood on its own feet, but the same approach was used in each instance. In the case of gas operations, the commission found a slightly higher rate of return to be justified —5.85 per cent rather than the 5.8 per cent for electric operations. The gas filings included a so-called purchased gas adjustment clause designed to pass on to customers future increases or decreases in the prices of pipeline gas. This was conceived to be an appropriate method for a distributing company to take account of changes in pipeline charges over which it has no control, and, furthermore, it seemed to present a workable method of passing on to consumers any refunds which might result from disapproval by the Federal Power Commission of pipeline increases that were in effect under bond. This gas adjustment clause was approved by the commission and is in effect.

I THINK all utility lawyers in Illinois will agree that our commission is acutely aware of the problem of regulatory lag. Proceedings are expedited by permitting the use, in smaller cases, of "canned testimony," and even in a case as large as Edison's, the direct testimony was prepared in written form and *read* into the record. The commission was alert to prevent delays in cross-examination, and the end result is shown by the entry of an Edison order some four months prior to the end of the statutory suspension period. Utilities are receiving the benefit, in Illinois, of intelligent and fair rate regulation.

I hope that I have not lost your interest by discussing a specific case in dealing with developments in the field of electric utility law, but, as I said at the beginning, the Edison proceeding seems to me to illustrate a number of the problems and interesting issues which arise for all electric utilities in rate proceedings.

Important Developments Relating To the Gas Industry

By CHARLES C. McDUGALD*

IN any discussion of recent developments in the utility law relating to the gas industry within the time allotted me, a problem of selection arises as to which of the many developments will be most significant. Although many of you are concerned principally with local distribution problems, I believe that today, as a result of the tremendous growth of the natural gas transmission industry and the number of local distribution companies that have converted to the use of natural gas, our immediate attention should be focused on the transmission, or Federal Power Commission, side of the picture for the simple reason that here many vitally important legal issues have and are being decided that will be finally translated to the local distribution companies, both in the field of rates and administrative philosophy. I have no doubt that substantially all of you who are here present have been, or soon will be, confronted with some of the many problems that will arise under the developments to which I will rather briefly refer.

Time does not permit a discussion of the many bills introduced in the 83rd Congress that are of general interest to the industry;[1]

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however, one has been enacted into law[3] which should be mentioned. This bill, known as the Hinshaw Bill,[3] reverses the East Ohio Gas Company Case[4] and exempts from Federal Power Commission jurisdiction those companies engaged in the transportation in interstate commerce or the sale in interstate commerce for resale of natural gas received by such person from another person within or at the boundary of a state if all the gas so received will be ultimately consumed within the same state.[5] Importantly, however, such exemption extends only to those companies whose rates, services, and facilities are subject to regulation by a state commission.[6]

UNDER its Docket R-136 the Federal Power Commission has adopted rules for the claiming of this exemption,[7] compliance with which is relatively simple.[8] In substance, all that is required is a statement showing that the natural gas received by the applicant is consumed within the state of receipt and a certificate from the state commission showing the applicant's rates, service, and facilities are subject to its jurisdiction and that the same is being exercised.[9]

Two decisions this year, one by the Supreme Court of the United States[10] and the other by the Federal Power Commission, constitute, in my opinion, the most important and significant developments in the gas industry in a decade, and will, unless changed or modified by congressional action, have a more real and lasting effect upon the entire industry and those having association with it than any case thus far decided under the Natural Gas Act, unless it be the Hope Case.[11] While the Supreme Court's decision is concerned with the jurisdiction of the Federal Power Commission under the Natural Gas Act and that of the commission is concerned with rates, they are closely associated in a final analysis of their significance.

I will thus confine the remainder of my present remarks to these two matters; however, in the printed copies of such remarks, which I understand are to be distributed to the members of this section, I have endeavored to indicate several other important court and commission decisions that merit your attention.

IN the Phillips Case,[12] in very brief summary,[13] the Supreme Court held specifically that a sale of residue gas by an independent producer to an interstate transmission line for resale, where such producer had theretofore produced (and in part purchased at the wellhead), gathered, and processed such natural gas, was a sale in interstate commerce for resale for ultimate public consumption within the meaning of the Natural Gas Act[14] and was subject to the jurisdiction of and regulation by the Federal Power Commission,[15] stating:[16]

> We are of the opinion, however . . . that production and gathering, in the sense that these terms are used in § 1(b), end before the sales by Phillips occur.[17]

The court, however, although having found as a matter of law that Phillips' sales occur after production and gathering, as those terms are used in § 1(b), had ended, observed that the natural and clear meaning of the phrase production and gathering is that it encompasses the physical activities, facilities, and property used in such process, and that such exemption does not include the "business" of production and gathering with the sale of the product considered as an integral part of such business.

CONTINUING, the court in broad language states that the legislative history of the act

> . . . indicates a congressional intent to give the commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company.[18]

and that:

> Regulation of the sales in interstate commerce for resale by a so-called independent natural gas producer is not essentially different from the regulation of such sales when made by an affiliate of an interstate pipeline company.[19]

Under the broad sweep of such language, the conclusion seems inescapable that the commission's jurisdiction extends to a sale of natural gas at the wellhead[20] if such sale is one in interstate commerce for resale for ultimate public consumption.[21] While it may

well be that many sales of gas made at the wellhead or during the course of gathering[22] are not sales in interstate commerce for resale subject to the jurisdiction of the commission,[23] the impending conflict between the area within which the states may establish minimum prices and that within which the Federal Power Commission shall fix the "just and reasonable" price, or rate, would seem very near at hand, if, indeed, it is not already here.[24]

On July 16, 1954, the commission, under its Order No. 174,[25] issued rules relating to tariff filings and certificate applications by independent producers, which make it quite clear that any sale, if in interstate commerce for resale for ultimate public consumption, is intended to be covered whether at the wellhead, during gathering, or after processing.[26]

IN brief summary, the commission's rules freeze all services and gas purchase prices of independent producers as they existed on June 7, 1954, the date of the Phillips decision, prohibit any changes in such rates or services effective on such date except in the manner provided in the Natural Gas Act,[27] and require all independent producers to file applications for certificate of public convenience and necessity on or before October 1, 1954. Additionally, under § 157.28 of such rules, the abandonment of any sale, transportation, or service subject to the commission's jurisdiction, which was being rendered on June 7, 1954, is specifically prohibited without permission of the commission first had and obtained.[28]

The Phillips decision, while concluding the first chapter in a long and, at times, confusing controversy,[29] obviously presents a myriad of new problems for the Federal Power Commission, the states, natural gas producers, pipeline companies, gas distributors, gas consumers, and those not associated with the gas industry, but who have a direct and substantial interest therein. The legal problems arising under it are legion and, I am confident, will in one form or another be presented to substantially every lawyer present in this group. Its impact has already been felt in several proceedings before the Federal Power Commission,[30] and its implementation presents the industry and the Federal Power Commission with a formidable and staggering task.

WHILE legislation[31] may ultimately reverse the Phillips decision, the interim period would present a complex and virtually insurmountable task for both the commission and the industry if the traditional commission method of valuing pipeline-produced gas[32] should be applied to the independent producers. The recent opinion of the Federal Power Commission in the rate proceeding of Panhandle Eastern Pipe Line Company[33] is therefore of vital significance in this discussion.

In such opinion, again in very brief summary, the commission, with Commissioner Draper dissenting,[34] discarded its traditional "rate base approach" to valuation of a pipeline company's own production in fixing rates[35] and allowed a commodity value based on the weighted average arm's-length price of gas sold in the fields where such gas was produced and found that its traditional method of treating a pipeline company's products extraction business as a by-product of its transmission business and crediting the net revenues from the same to the company's cost of service in fixing rates[36] should not, under the facts of the record before the commission, be followed.[37] It further held that § 124-A of the Internal Revenue Code[38] did not authorize the commission to reduce Panhandle's rates by the temporary tax savings it secured as a result of accelerated amortization.[39]

In substance, the commission, without in any way departing from its traditional original cost or net investment formula in so far as Panhandle's transmission facilities were concerned, and after a searching analysis of the results of its past regulatory practices as to company-owned reserves, concluded that as a matter of sound public policy its treatment of pipeline company production theretofore followed should be discarded that the ultimate public interest might best be served.[40]

THE practical and economic consequences of the Panhandle formula for rate making are obvious; particularly so in light of the Phillips Case.[41] Many excellent articles have been written by others far more qualified than I concerning the problems that would arise in the event the independent producers should become subject to regulation by the Federal Power Commission.[42] While the Panhandle decision is not the panacea of

these problems, it should allow the commission to assume the burden of jurisdiction that has been thrust upon it under the Phillips decision with less alarm to the industry than would have followed under its former regulatory policies.

Footnotes

[1] Promulgation of safety requirements for natural gas pipelines (HR 134); transfer of certain powers of the Federal Power Commission to other federal agencies or the creation of a new agency to exercise such authority (HR 293, 6071, 6543, and S 2432); authorizing experiments by the federal government in the underground gasification of coal (HR 1601, 1727, 2836); exemption from the Natural Gas Act of arm's-length sales of gas by independent producers (HR 2120 and HR 9923); reduction of percentage depletion for income tax purposes with respect to oil and gas properties (HR 2513, 3764); limitation on exports and imports of natural gas which would affect interests of competing fuels in this country (HR 4227 and S 1287); extension of the eminent domain provisions of the Natural Gas Act to include underground storage of natural gas (S 525); amendment of § 4(e) of the Natural Gas Act to lengthen considerably the present five months' period of suspension of rate filings and make other changes with respect to exercise by the commission of its rate jurisdiction (HR 7624 and S 2971); amendment of § 6(a) of the Natural Gas Act to require the Federal Power Commission to use original cost in valuation of company-owned gas reserves for rate-making purposes (HR 8605, 8797, and S 3178); prohibiting the commission from charging more than nominal fees with respect to filing of applications for and issuance of certificates of public convenience and necessity (S 3203).

[2] One other bill of interest has also been enacted into law. Public Law 253 (formerly S 2220), approved August 12, 1953, amends § 28 of the Mineral Leasing Laws (30 USC 185) to provide that the common carrier provisions thereof shall not apply to any natural gas pipelines operated by any person subject to regulation under the Natural Gas Act or subject to regulation by a state or municipal agency having rate jurisdiction.

[3] HR 5976, Public Law 323, approved March 27, 1954.

[4] Federal Power Commission *v.* East Ohio Gas Co. (1950) 338 US 464, 82 PUR NS 1, 94 L ed 268.

[5] Two types of operations, which Congress declares to be primarily of local concern and subject to regulation by the several states, would seem to be covered under this bill:

(1) The local distribution company or retailer who takes title within the state of consumption, but continues the transportation for ultimate sale directly to the consumers.

(2) A transportation company, or wholesaler, who takes title within the state of consumption for transportation and resale to local retailers, the gas, however, to be consumed within the state, or one who performs such transportation for hire, wholly within the state of consumption, for the account of a retailer or wholesaler, if the gas is consumed within the state of receipt.

[6] It is further provided that a certificate from the state commission to the Federal Power Commission that such state commission has regulatory jurisdiction over rates and services of such person and facilities and is exercising the same shall constitute conclusive evidence of such regulatory power or jurisdiction.

[7] FPC Order No. 173, issued July 7, 1954, in Docket No. R-136; General Rules and Regulations of the Federal Power Commission, 18 CFR 152.1-152.5. It should be noted that while the Hinshaw Bill grants such exemption to those persons, otherwise qualified, who are *subject to* local regulation and makes a certification by the state regulatory commission that such jurisdiction is actually being exercised *conclusive evidence* of such regulatory power, the Federal Power Commission in specifying who may apply for such exemption (§ 152.1) requires that the state commission must actually be exercising such jurisdiction.

[8] Despite the simplicity of such rules, several rather perplexing problems exist under this legislation with respect to the scope of the local commission's regulatory powers within the state in which the claimed exempt operation takes place. If the regulatory body of the state has regulatory jurisdiction over rates and service but not over facilities, in the sense of requiring permits or certificates authorizing their construction or abandonment, it would seem that the jurisdiction of the Federal Power Commission would continue. A similar problem with reference to the scope of the state statute exists particularly as to stub lines connecting interstate pipelines with local distribution companies where only local franchises from municipalities are provided for. In substance, the benefits of the Hinshaw Bill may be deferred in many states until state legislative bodies have acted further in this matter.

[9] The first of such certificates under these rules was issued, I understand, by the Illinois Commerce Commission on July 14, 1954, to Gas Lateral Company; such company has theretofore obtained a certificate of public convenience and necessity authorizing its construction and operations by the Federal Power Commission in FPC Docket No. G-1986.

[10] Another decision by the Supreme Court of the United States, on February 8, 1954, is of tremendous importance to the industry, discussion of which is omitted here in the interest of time. In Michigan-Wisconsin Pipe Line Co. *v.* Calvert et al.; Panhandle Eastern Pipe Line Co. *v.* Calvert et al. (1954) 347 US 157, 74 S Ct 396, the Supreme Court, in a unanimous decision, held unconstitutional under the commerce clause, as both a direct tax on interstate commerce itself and sec-

ondarily as one that would permit a multiple burden on that commerce, a so-called "gathering tax" enacted by the legislature of a producing state, which by its definition of the term "gathering" was designed to pass on to the consuming states its principal burden. The taxable incident in this piece of legislation, the so-called "gathering," was, as stated by the Supreme Court, the taking of possession of the gas by the interstate pipeline companies at the outlet of gasoline plants for immediate transmission in interstate commerce. If held valid, little imagination is needed as to what such a tax could mean when ultimately translated into a cost of service to consumers far removed from the taxing jurisdiction.

[11] Federal Power Commission *v.* Hope Nat. Gas Co. (1944) 320 US 591, 51 PUR NS 193, 88 L ed 333.

[12] Phillips Petroleum Co. *v.* Wisconsin; Federal Power Commission *v.* State of Wisconsin, 347 US 672, 3 PUR3d 129 (decided June 7, 1954). Opinion by Mr. Justice Minton; Mr. Justice Clark, with whom Mr. Justice Burton joined, dissenting; Mr. Justice Douglas filing a separate dissent; and Mr. Justice Jackson taking no part in the consideration or decision of the case.

[13] The proceeding in this matter, which was culminated by the Supreme Court's decision on June 7, 1954, *supra,* had its inception in a motion made in October of 1946 by the city of Detroit, in the certificate application of Michigan-Wisconsin Pipe Line Company (FPC Docket No. G-669), urging that Phillips Petroleum Company, the sole supplier of natural gas to the applicant pipeline company, by reasons of the proposed sale to Michigan-Wisconsin would be engaged in the transportation of natural gas in interstate commerce and the sale of such gas for resale; that therefore Phillips would become a "natural gas company" subject to the commission's jurisdiction. FPC 1 (24-26). Such motion was dismissed, however, on the ground that such a determination should be made in a separate proceeding after a more thorough investigation of Phillips' operations ([1947] 6 FPC 1, 26, 67 PUR NS 427) and thereafter a separate proceeding was initiated in October of 1948 by commission order. (1948) 7 FPC 983. In 1951, the commission, in a 4-to-1 decision concluded that Phillips' sales were a part of or incident to gathering and thus exempt under § 1(b) of the Natural Gas Act and that regulation of such sales by the commission would be inconsistent or a substantial interference with the exercise of the states' regulatory functions under the rule of the Interstate Case ([1947] 331 US 682, 690, 69 PUR NS 1); (1951) 10 FPC 246, 90 PUR NS 325. In May of 1953, the United States court of appeals for the District of Columbia, one judge dissenting, reversed the commission. (1953) 92 US App DC 284, 100 PUR NS 506, 205 F2d 706. Certiorari was thereafter granted by the Supreme Court.

[14] 52 Stat 821, as amended, 15 USCA § 717 *et seq.*

[15] The specific holding of the court would appear to have been prophesied in the gathering tax cases, note 10 *supra* (which were concerned with two of the sales by Phillips Petroleum Company to interstate pipeline transmission companies that were also before the Supreme Court in the Phillips Case), in this language (347 US 157, 74 S Ct 396, 402):

> But the tax here is not levied on the capture or production of the gas, but rather on its taking into interstate commerce *after* production, gathering, and processing.

[16] 347 US at 678, 3 PUR3d at 132.

[17] Section 1(b) of the Natural Gas Act provides:

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

[18] 347 US at p. 682, 3 PUR3d at p. 135.

[19] 347 US at p. 685, 3 PUR3d at p. 136.

[20] Mr. Justice Clark, in his dissenting opinion, would appear to so construe such language (347 US at 691) and there would appear to be no doubt of the Federal Power Commission's interpretation. Mr. Kuykendall, chairman of the commission, in testifying recently before the Senate Appropriations Committee, stated that if gas moves in interstate commerce, the commission's jurisdiction, as the commission interprets the Phillips Case, extends to a wellhead sale.

[21] In rejecting the argument as to conflicting state jurisdiction and the opposition of the producing states to federal control of sales during production and gathering, the court rather tersely stated (347 US at 681, 3 PUR3d at 134):

> The short answer to this contention is that the jurisdiction of the Federal Power Commission was not intended to vary from state to state, depending upon the degree of state regulation and of state opposition to federal control.

It is significant that on the same day that it handed down the Phillips decision, the Supreme Court denied petition for rehearing of its denial of certiorari (347 US 1022) in Kansas State Corp. Commission *v.* Federal Power Commission (CA8th 1953) 1 PUR3d 310, 206 F2d 690, in which the court of appeals had held that the Federal Power Commission was not required, in fixing rates of a natural gas company, to allow as a part of such company's cost of service the Kansas minimum wellhead price regulation which it directed should be attributed to all gas produced within the state. Thus, under this decision, and the Phillips decision, it would seem that a state minimum price regulation, such as was sustained by the Supreme Court in Cities Service Gas Co. *v.* Peerless Oil & Gas Co. (1950) 340 US 179, 87 PUR NS 41, may now be but narrowly applied in that area not pre-empted by the Natural Gas Act, Ohio Pub. Utilities Commission *v.* United Fuel Gas Co. (1943) 317 US 456, 466, 46 PUR NS 257, whether the sale be at the wellhead, during gathering, or after transmission..

[22] For example: A producer selling raw natural gas at the wellhead to a company such as Phillips, who in turn gathers the gas, commingles it with

other purchased or produced raw natural gas, processes the same and sells the separated constituents.

[23] Parker *v.* Brown (1943) 317 US 341, 87 L ed 315. Cf. Dahnke-Walker Milling Co. *v.* Bondurant (1921) 257 US 282, 66 L ed 239; Lemke *v.* Farmers' Grain Co. (1922) 258 US 50, 66 L ed 458; Shafer *v.* Farmers' Grain Co. (1925) 268 US 189, 69 L ed 909.

[24] In Natural Gas Pipeline Co. of America *v.* Panoma Corp. (Okla Sup Ct, 1953) 271 P2d 354 (now the subject of an appeal to the Supreme Court of the United States, Docket No. 191, October term, 1954) and in three other cases consolidated for hearing, Michigan-Wisconsin Pipe Line Co., Panhandle Eastern Pipe Line Co., and Natural Gas Pipeline Co. of America *v.* Oklahoma Corp. Commission (decided by the supreme court of Oklahoma on April 27, 1954, 272 P2d 425, which are now being appealed to the Supreme Court of the United States) the supreme court of Oklahoma has affirmed an order by the conservation commission of that state which, on the alleged grounds of conservation to prevent both actual and economic waste, prohibits the production of gas in the Guymon-Hugoton field of Oklahoma unless the producer, who in all three cases also processes the gas (as to Michigan-Wisconsin Pipe Line Company and Panhandle Eastern Pipe Line Company, the producer is Phillips Petroleum Company and the sales are two of those before the Supreme Court of the United States in the Phillips Case), receives therefor the minimum price established by such commission.

While one of the principal issues presented in such cases is whether the attempted minimum price regulation, under the facts presented in these cases, can be validly imposed under the commerce clause without regard to the Natural Gas Act, the Federal Power Commission has, quite recently, with respect to gas produced by Phillips and sold to Michigan-Wisconsin, expressly refused to give effect to such minimum price order in the rate proceedings of the latter company. See FPC Opinion No. 275, issued July 30, 1954, In the Matter of Michigan-Wisconsin Pipe Line Co. FPC Docket Nos. G-1678 and G-1996.

See also Kansas State Corp. Commission *v.* Federal Power Commission, note 21, *supra.*

[25] FPC Order No. 174, Docket No. R-138.

[26] See § 154.91—"'Independent Producer' Defined.—An 'independent producer' as that term is used in these rules means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline."

It is interesting to note that the wholesale in interstate commerce that is specified in such definition is in no way limited to sales to interstate pipeline companies.

[27] See §§ 4(c), (d), and (e) of the Natural Gas Act [15 USCA § 717]. Note, however, that under § 154.94, the commission has waived the statutory 30-day minimum notice with reference to an escalation or other change in a contract which is to become operative after June 7, 1954, but prior to September 15, 1954.

Prior to the issuance of Order No. 174, the commission, in its Docket R-137, gave notice of proposed rule making, stating it was considering the desirability of promulgating rules concerning accelerated and favored-nation clauses in gas purchase contracts. Oral argument in this matter is, at this date, set for September 30, 1954.

[28] See *supra,* note 24, and note the obvious area of conflict with the state minimum price orders mentioned.

[29] Almost fourteen years to the day prior to the Phillips Case, on June 29, 1940, the commission in its first opinion concerned with the question of regulation of an independent producer (*i.e.,* a proceeding under 4(e) of the Natural Gas Act concerning a price escalation clause in a gas purchase contract) concluded, in a 4-to-1 decision,

> . . . that it was not the intention of Congress to subject to regulation under the Natural Gas Act all persons whose only sales of natural gas in interstate commerce . . . are made as an incident to and immediately upon completion of such person's production and gathering of said natural gas and who are not otherwise subject to the jurisdiction of this commission.

See In the Matter of Columbian Fuel Corp. (1940) 2 FPC 200, 208, 35 PUR NS 3, 10. Ironically, conclusions expressed by the dissenting commissioner in such case, 2 FPC 200, 208-217, 35 PUR NS 3, 10-18, appear to be substantially the same as those reached by the majority of the Supreme Court in the Phillips Case.

[30] In its Opinion No. 275, note 24, *supra,* the commission, in a rate case of the pipeline company, refused to allow certain price escalations in Michigan-Wisconsin Pipe Line Company's gas purchase contracts with Phillips (in addition to refusing to give effect to a state minimum price regulation) where such escalations were such that their final effectiveness could not be determined until after June 7, 1954.

In the rate proceedings of Tennessee Gas Transmission Company, FPC Docket No. G-2434, which include substantial increases in costs of service based upon price escalations in gas purchase contracts, a motion has been filed in which it is contended that the increase should be denied and the matter terminated, for the reason that the commission must first determine the reasonableness of the rates charged by the producers to the pipeline company.

In the certificate application of American Louisiana Pipe Line Company, FPC Docket Nos. G-2306 et al., William J. Grove, assistant general counsel, on July 20, 1954, stated the position of the bureau of law of the Federal Power Commission to the effect that an applicant pipeline company cannot, in law, prove that it has a gas supply until the producers with whom it has gas purchase contracts have obtained certificates from the Federal Power Commission—that until that time not one foot of gas can lawfully flow from the producers into the interstate transmission lines. Subsequently, Panhandle Eastern Pipe Line Company, an intervenor in such proceedings, filed a motion to suspend the hearings until the independent producers with whom American Louisiana has gas purchase contracts expressed their willingness to make sales under the jurisdiction of

the commission. Such motion was denied by order of the commission on July 30, 1954; however, such order makes clear the commission's position that the producers proposing to sell to American Louisiana must apply for and obtain certificates before the applicant pipeline company can show it is willing and able to perform the services it proposes as required by § 7(e) of the Natural Gas Act.

[31] The most recent bill introduced in Congress in this regard is HR 9923, by Rogers of Texas (July 15, 1954), which would include the sale of gas within the production and gathering exemption of § 1(b) by a person who is not engaged in (or affiliated with any natural gas company engaged in) the transmission of gas in interstate commerce or the distribution of natural gas to the ultimate consumers; but only with respect to sales made thirty days following the date such bill may be enacted.

[32] The traditional commission method of valuing interstate pipeline company-produced gas (the so-called "rate base approach") was essentially as follows: Natural gas in place and the properties and equipment utilized in its production were included in the rate base at original cost less depletion and depreciation, and a rate of return was allowed thereon equal to the rate allowed over all. Operating expenses chargeable to production were included in recoverable costs of service. All expenses associated with extraction of liquid hydrocarbons, the facilities of which were also included in the rate base at original cost less depreciation, were allowed as operating expenses, but corresponding credits to the cost of service were made for revenues received from the sale of such products. Allowance for taxes on the production properties was made in accordance with the actual tax payments made.

[33] Opinion No. 269—In the Matter of Panhandle Eastern Pipe Line Co. (1954) FPC Docket Nos. G-1116 et al. 3 PUR3d 396. Issued April 15, 1954.

[34] Commissioner Doty also entered a dissent, but only with reference to the treatment by the majority of federal income taxes as affected by accelerated amortization.

[35] See note 32, *supra.*

[36] See note 32, *supra.*

[37] The commission assigned four primary reasons for adopting the "commodity" method: 1. The "rate base approach" did not make economic sense, since it resulted in multiple pricing of gas from the same wells going to the same consumers. 2. Such approach did not promote that conservation in both the production and use of natural gas which is in the public interest, because an arbitrarily depressed price tends to accelerate consumption and fails to encourage discovery and development of this limited and irreplaceable natural resource. 3. The public interest definitely lies in the direction of production of gas by the pipeline companies themselves, as against complete dependence upon other producers for their gas supply; it is better that the pipeline companies be in a position to control their gas supply and thus be enabled to render adequate service, than that low rates exist on paper but no gas be available for purchase by the customer. 4. Development of gas reserves by pipeline companies cannot be compelled by the commission and it follows, therefore, that such development must result from rate regulatory policies designed to encourage, rather than to penalize, the companies in the development of their own gas supply.

The basic reason given by the commission for treating the products extraction business of interstate pipeline companies as nonjurisdictional is that the rates prescribed for the sale of natural gas for resale should not rest in part upon the fluctuating and unregulated prices of natural gasoline and other liquid hydrocarbons.

[38] 26 USCA § 216 (a).

[39] See Opinion 264, issued on December 4, 1953, in FPC Docket No. R-126, in which the policy of the commission in this regard is similarly expressed, and Orders No. 171, 3 PUR3d 91 (April 21, 1954), and 171-A (May 17, 1954), issued in the same docket, prescribing amendments to the Uniform System of Accounts.

[40] Bills have been introduced in both the House and Senate to require the commission to value company-owned gas reserves on an original cost basis. Hearings were scheduled on S 3178, introduced by Senator Ferguson of Michigan, but were postponed from time to time. On June 25, 1954, the Senator advised the subcommittee of the Senate in charge of the bill that in the light of the Supreme Court's decision in the Phillips Case, his legislative proposals need considerably more study and that it would be desirable to further postpone the hearings. The chairman of the subcommittee announced on June 26th that such hearings had been postponed indefinitely.

[41] Emphasis is here given to the Panhandle formula as it relates to independent producers because of the impact of the recent Phillips decision. Its tremendous importance to transmission companies as a stimulant to both retain and acquire new reserves, with the resultant benefit to the consumers served by them, is not intended to be ignored.

[42] Hardwick, "Some Consequences of Fears by Independent Producers of Gas of Federal Regulation." 19 *Law and Contemporary Problems* 342; Baker and Illig, "Natural Gas Supplies for Tomorrow," 19 *Law and Contemporary Problems* 361.

Telephone Rate Case Developments

By G. WALLACE BATES*

At the outset I would like to put to you a hypothetical case. Suppose that the value of the dollar had declined until it was worth only one cent. Would rates of a utility be fair and reasonable if they were fixed without giving consideration to the inflation which

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had occurred? I believe that most people would agree that if rates were then fixed on the basis of original cost or nominal dollars, almost the entire investment would be confiscated—at least 99 per cent of it would be.

I put that case because one of the most important questions in communications law during the past three or four years has been: Will the commissions and courts make allowance for inflation in fixing rates? It is true that the dollar has not become worth only one cent, but within a few years it has been reduced in value by 50 per cent. The difference in the effect on utilities and investors would seem to be only one of degree.

Although the forces of inflation have abated since last year's meeting of the American Bar Association, the question whether allowance would be made for inflation has been as vital as before. Using our example of the one-cent dollar again, even though the dollar were stabilized at a value of one cent, there would still be a long period in which allowance would be needed for the continuing effects of the inflation which had taken place.

In view of the importance of the question whether allowance will be made for inflation, I propose to review briefly with you decisions in Bell system rate cases during the past year which indicate whether commissions and courts are or are not recognizing this factor. As Mr. Jones will also deal with developments in communications law (see page 416), I will limit myself to Bell system cases.

Fair Value

THE most direct method by which commissions or courts have given recognition to the forces of inflation is by the adoption of a fair value rate base which gives substantial weight to current cost. During the past year two additional states, North Carolina and Delaware, have recognized in Bell system rate cases that rates should be fixed on a basis which will provide a fair return upon the fair value of the company's property.

In North Carolina the statute provides that in fixing rates, "the commission shall take into consideration if proved, or may require proof of, the value of the property" and shall further consider the original cost of construction of the property and the present compared with original cost. In a Southern Bell Telephone Company rate case, the commission adopted cost less depreciation as being the proper rate base. The Supreme Court held that this was in error and stated:

> . . . The conclusion is inescapable that by accepting the book value as the rate base, it, *ex necessitate*, excluded consideration of present cost of replacement and all other factors from effective consideration.

However, while recognizing that a fair value rate base must be used, the court refused to make allowance for economic depreciation.[1]

The Delaware statutes, like the statutes of many states, authorize the commission to fix just and reasonable rates and also authorize the commission, if it should determine it to be necessary, to ascertain the fair value of a utility's property.

The commission fixed a rate base for the Diamond State Telephone Company which was approximately 12 per cent in excess of original cost.[2] The company appealed to the superior court for New Castle county. That court reversed the commission and found a higher fair value rate base.[3] However, the Delaware supreme court has now reversed the superior court and accepted the commission's finding of value.[4]

Adjustment in Rate of Return

IN the past, proponents of prudent investment or original cost rate bases commonly contended that the rate of return could be increased or decreased with changing price levels and that consequently no adjustment in the rate base is necessary. Their contention was that only one factor should be adjusted and not two. Thus, the Federal Power Commission in its brief in the Hope Case argued that with fluctuations in the price level, common stockholders may be adequately protected by adjusting the rate of return.[5] While this contention regarding the possibility of adjustment in the rate of return was made by the proponents of prudent investment rate bases before substantial inflation had taken place, most of such proponents have recently been silent on that subject.

Even though the proponents of a changing rate of return to reflect changing price levels have recently been silent, during the course of the last two or three years we have noticed a tendency for commissions gradually to increase the rates of return allowed in Bell

system rate cases. This has been continued in the past year as illustrated by the following cases:

The Colorado commission, by its order of October 9, 1953, granted the Mountain States Telephone & Telegraph Company a rate return of 6.69 per cent compared with 6.35 per cent which the commission had previously allowed.[6] The commission also made an allowance for attrition.

The North Dakota commission, in its order of December 30, 1953, found that the Northwestern Bell Telephone Company's capital costs had increased approximately one-half of one per cent during the previous year, and allowed a rate of 6¼ per cent compared with a previous allowance of 5¾ per cent.[7]

The Oregon commission, in an order dated October 6, 1953, recognized that the cost to the Pacific Telephone & Telegraph Company of obtaining capital had increased, and allowed the company a return of 6 per cent compared with 5.6 per cent, which the commission had previously allowed.[8]

The Rhode Island Public Utility Administrator, in an order on remand from the court, allowed the New England Telephone & Telegraph Company a return of 6.25 per cent compared with the return of 5.3 per cent previously allowed.[9]

The California commission, in an order dated July 6, 1954, fixed rates for the Pacific Company on the basis of a 6.25 per cent return compared with the previous 5.6 per cent.[10] However, disallowances of expenses both in the recent and in previous cases substantially lower the actual rate of return allowed.

Specific Allowances for Attrition

ONE of the traveling companions of inflation is the attrition or wearing away of rate of return which results from adding new high-cost plant. While an allowance for attrition does not give the investors in a utility a higher permanent return to compensate for inflation, such an allowance does provide some temporary relief.

The Minnesota commission, in its order of January 8, 1954, found specifically that if Northwestern Bell Telephone Company is to earn the return which the commission decided was reasonable, allowance must be made for the effect of large-scale construction on the company's rate of earnings. The commission therefore made a substantial addition to the rate base and allowed a return of 6.25 per cent on that base.[11]

In its order of December 29, 1953, in a case involving the Mountain States Telephone & Telegraph Company, the Utah commission found from past experience that if the commission based its determination on the results of operations and rate base covering a past period, the required return would not be earned in the future because of the construction program. To compensate for this, the commission allowed a return of 6.5 per cent and stated that it believed such a return would enable the company to earn approximately 6 per cent.[12]

Unfavorable Decisions

WHILE Bell system companies have generally contended that an allowance should be made for inflation, not all commissions and courts have been willing to make allowance in one form or another. Examples of adverse decisions are:

The Michigan commission, in an order dated May 11, 1954, denied an increase in rates to Michigan Bell Telephone Company.[13] In so doing, the commission denied the company's claim for additional revenues to compensate for economic depreciation. It also found a return of 6.5 per cent on capital to be sufficient and on the commission's basis of computation found that the company was already earning more than that amount.

On May 8, 1954, the supreme court of New Mexico rendered a decision in a Mountain States Telephone & Telegraph Company rate case, which largely involved procedural problems under the New Mexico Constitution.[14] The company had contended for a fair value rate base but the court held that no single formula need be used in arriving at the rate base. The court also said that the investors cannot be insured against the effects of inflation.

THE New Jersey commission, in a decision dated January 14, 1954, adhered to its previous decisions by making a disallowance of certain expense items and by finding that a rate of return ranging between 5.7 per cent and 6.26 per cent on average net investment is fair. The West Virginia commission also made disallowance of various items

of expense and allowed a return of 6.17 per cent.[15] As a result of the disallowances of the New Jersey and West Virginia commissions, the rate of return which will actually be realized is substantially less than that indicated in the opinions.

The Alabama commission, in an order dated April 21, 1954, denied any increase in rates to Southern Bell Telephone & Telegraph Company,[16] but the circuit court has granted supersedeas, and new rates to produce 6⅔ per cent on a fair value rate base have been placed in effect under bond.

On August 5, 1954, the New York commission, in denying an increase in rates to New York Telephone Company, stated that it found nothing in the New York statutes or decisions which guarantees utility stockholders insurance against the effects of economic forces.[17]

Regulatory Lag

One of the difficult problems facing public utilities during periods of inflation arises from the delay in obtaining rate orders from commissions. Many months, and sometimes years, elapse before the company is able to obtain an order from the commission to compensate for increased expenses which have already taken place. This difficulty is compounded by the insistence of some commissions on allowing rates on the basis of past test periods and past rate bases. Consequently, the companies are on a constant treadmill and in many cases are never able to earn even as much as the rate of return which the commission purports to allow.

During the past year commissions generally have been more prompt than in earlier years in rendering decisions in Bell system rate cases. Several commissions have rendered rate orders within three or four months of the time of filing for new rates. However, while there has been some progress on this score, during the past year we have had one decision which was not rendered until nineteen months after the case was filed. In another case, the company filed an application in May of 1952 to recover wage and tax increases which occurred in 1951 and 1952. Notwithstanding the admitted increase in expenses, the commission waited until May of 1953 before issuing its order denying an increase. In that state an application for rehearing is a necessary preliminary to an appeal.

The commission did not issue its order on rehearing, which again denied an increase in rates, until May of 1954, two years after the case was filed. The case is now on review in the supreme court of the state. During the course of the case the company was able to obtain an injunction from the district court permitting it to place the increased rates in effect, under bond, but the case is still an example of the failure of the regulatory process in some states.

Fortunately, such failures of the regulatory process are the exception rather than the rule, but the average delay in obtaining relief is still a serious problem.

Conclusion

From these cases which I have referred to, the conclusion reasonably can be drawn that there is a movement toward making some compensation for inflation in rate cases in the communications field. That movement certainly is not without its dissenting voices, but when the states which have made such compensation during the past year are added to those which have taken similar action in previous years, the list is impressive.

Viewed from the standpoint of the utilities, the movement seems much too slow and halting. There is another factor here, however, which is encouraging. Many commissions and commission staffs have long advocated a net investment rate base, and to some of them the cause took on the form of a crusade. To this net investment rate base they wished to apply a fixed rate of return. I believe it is fair to say that during the early years of the postwar period a number of commissions and staffs developed a fairly inflexible position in rate cases.

By way of contrast, the cases I have cited reflect a disposition of many commissions in more recent cases to take a broader view of the whole economic problem of utilities. It is significant that when such a view is taken, many commissions have concluded that some compensating allowance should be made.

Footnotes

[1] (1954) 3 PUR3d 307, 317, 80 SE2d 133.
[2] (1953) 1 PUR3d 84.
[3] (1954) 3 PUR3d 255.
[4] July 23, 1954.
[5] Brief of Federal Power Commission in Federal Power Commission *v.* Hope Nat. Gas Co., p. 48 (transcript pp. 7621-7622).
[6] 1 PUR3d 129.
[7] 2 PUR3d 93.
[8] 1 PUR3d 1.
[9] December 15, 1953.
[10] Decision No. 50258, Application No. 33935.
[11] 2 PUR3d 33.
[12] 2 PUR3d 75.
[13] T-252-54.10.
[14] 270 P2d 685.
[15] Case No. 4000, March 19, 1954.
[16] 4 PUR3d 195.
[17] Case 16548.

Recent Developments in the Law of Communication Regulations

By JOHN ROBERT JONES*

IT is a great personal pleasure to participate in your panel discussion. I shall limit these brief remarks to a review of recent cases pertaining to two issues frequently encountered in rate litigation—the effect of the adequacy of service on the right to rate relief and the right to injunctive relief against a confiscatory rate order.

Service Cases

AT the last meeting of the association in Boston, Mr. Milne, in his excellent report on communication utilities, commented on the question of adequacy of service rendered. Mr. Milne pointed out that the customary procedure has been to consider service cases apart from rate cases but that this customary procedure was departed from by the Ohio commission in its consideration of the rate application of the Elyria Telephone Company. In that proceeding, the Ohio commission conditioned a rate increase upon an improvement of service.[1]

The supreme court of Ohio reversed that order and directed the commission to authorize adequate rates. The court stated: "A public utility commission may not so act as to confiscate the property of a utility and where it is determined that adequate rates do not exist, an order granting an increase but suspending the same until such time as certain facilities and improvements are provided does have that effect."[2]

The question of the authority of a public utility commission to withhold or condition the granting of adequate rates upon an improvement in service has been ruled on in several jurisdictions during the past year. In some cases the courts have based their decision upon a construction of the applicable statutes. In others, the courts, apparently following the above quotation from the Elyria Case, have ruled that such a denial or suspension of adequate rates is constitutionally invalid.

THE Florida Railroad and Public Utilities Commission in Re Florida Teleph. Corp.[3] found that the existing rates of the applicant company were inadequate. In the rate proceeding the commission received service testimony. The commission stated that the failure of a utility to meet its obligation to render adequate service in a reasonable manner jeopardized the utility's right to a fair return on the reasonable value of its property devoted to the public service. A penalty reduction of 25 per cent in the applicant's rates and charges was found to be justified on the basis of the quality of service presently being rendered. Since the existing rates were somewhat in excess of what the rates would have been if the application had been granted and a penalty reduction of 25 per cent immediately imposed, the application was denied.

The Florida supreme court in Florida Teleph. Corp. *v.* Carter[4] reversed this decision of the commission. The supreme court stated, "Under our statutes the rate-making

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power should be exercised in one proceeding and the question of the adequacy or inadequacy of equipment, repairs, and improvements, and service should be disposed of in another proceeding." However, the court quoted with approval the Elyria decision and stated that the imposition of penalties for inadequate service and the fixing of rates involve different theories. The court stated that if the service was poor or inadequate, the commission could, and should, take appropriate action as provided by law.

IN City of Ludington et al. *v.* Michigan Pub. Service Commission,[5] a municipality contended on appeal to the circuit court that a utility has no right to a reasonable return upon its property unless it is rendering adequate service to its customers. The circuit court dismissed the city's bill of complaint and held: "Adequate and nonconfiscatory rates cannot be denied to a utility upon the theory that the value of existing service does not warrant an increase in rates." The court further stated:

> If existing service is found by the commission to be inadequate in certain instances, the commission cannot impose the penalty of confiscation for such inadequacies. This would be not only contrary to law but also, as the commission staff recognized, would prevent the company from ever attracting needed capital to make service improvements. Such action would have the effect of causing service to deteriorate rather than to improve, and would be against the interest of the public served by the company.

In General Teleph. of Indiana *v.* Public Service Commission, an Indiana court reversed an order of the Indiana commission providing that the furnishing of reasonable and adequate telephone service is a condition precedent to the collecting of telephone rates upon an increased basis and reinstating a suspension of rates.[6] The court approved the Elyria and Florida Telephone cases, and held that an order suspending rates because of inadequate service is not a proper part of a determination of a hearing for the purpose of determining rates.

THE Utah commission has in the past denied rate increases because of claimed inadequacy of service. In Re Mountain States Teleph. & Teleg. Co., Case No. 3939, dated December 29, 1953, the Utah commission recognized the fact that a utility must have adequate earnings in order to provide the funds required for the addition of equipment and facilities to expand and improve service.[7] The commission said:

> As long as there is an unsatisfied demand for telephone service it is clear that the company has a statutory duty to provide the plant to furnish such service. Money must be secured from investors to pay for the added plant, and the company is entitled to a fair return on funds so invested. We believe the first concern of the telephone subscriber is that the service must be first class. Adequate plant is a prerequisite to good service. As we conceive our primary duty, it is to take the steps necessary to permit a utility to render the service reasonably required by its customers at the lowest rates consistent with the financial health of the company which provides the service. This contemplates the management of the utility will be prudent and that the interests of the customers will receive the same consideration as the stockholders. It would not be in the public interest if the agencies providing our public utility services were not kept in a sound condition financially.

Injunction Cases

IN General Telephone Co. of Michigan *v.* Michigan Pub. Service Commission,[8] an appeal from a rate order, the circuit court of Ingham county received evidence different from, or additional to, that presented to the commission and some of which pertained to operations of the company subsequent to the date of the hearing in the proceedings before the commission. The court held that failure to receive such additional evidence would make it impossible to test the validity of a rate order as against the claim of confiscation by the actual impact or effect of the order appealed from. The court found the rate order appealed from to be unreasonable, unlawful, and confiscatory, issued an injunction, and remanded to the commission for the fixing of just and reasonable rates. Pending action by the commission, the company was authorized to establish and collect rates and

charges no greater than those requested in its application to the commission.

Three Texas cases pertained to the so-called "status quo" doctrine as applicable to injunctions against rate orders.

In Southwestern Associated Teleph. Co. *v.* City of Dalhart, 254 SW2d 819, the Amarillo court of civil appeals affirmed a decision of the district court denying an injunction against an alleged confiscatory rate order.[9] The court cited cases to the effect that the purpose of the issuance of a temporary injunction is to maintain the "status quo" in regard to the matter in controversy and not to determine the respective rights of the parties under the cause of action asserted or defenses urged. The court stated that the "status quo" was the existing telephone rates being charged by the utility at the time the action was filed and as provided in the ordinance complained of. This case was taken to the supreme court of Texas and returned, writ of error refused, no reversible error.

In a subsequent case, City of Baytown *v.* General Teleph. Co. of the Southwest, the Galveston court of civil appeals affirmed a decision of the trial court enjoining a confiscatory rate ordinance.[10] This court held that injunctive relief was the only possible way by which the utility could be protected from immediate irreparable injury and that a denial of the injunction would have meant a continued taking of the utility's property without just compensation until the matter had been finally adjudicated and the consequent loss of revenues would have been impossible to recoup even though the utility's position were vindicated on final hearing. The court held that the actual "status quo" was being maintained at the present time under the nonconfiscatory rates set by the utility under the posting of the refunding bond, that the true "status quo" that equity seeks to maintain is one in which neither party is subjected to damage. The court said "fair and reasonable rates to both appellants and appellee is a true status quo." This case was also returned by the supreme court of Texas marked "writ of error refused, no reversible error."

In an even more recent case, City of Houston *v.* Southwestern Bell Teleph. Co., No. 12685, in the Galveston court of civil appeals, the court followed the Baytown decision, sustained the decision of the trial judge in enjoining the rate ordinance as confiscatory, and held that the "status quo" to be preserved is that status which does not deprive appellee of its property without due process of law.[11] This case was likewise taken to the supreme court of Texas and the court again refused to grant a writ of error.

Two other Texas injunction cases involved the jurisdiction of federal district courts to enjoin rate orders under the provisions of the Johnson Act, Title 28 USCA § 1,342. One of the issues in the Dalhart Case, previously referred to, was whether or not there was an actual rate order in existence. After the litigation above described, the company, taking the position that the ordinance had legally expired, inaugurated new and increased rates on its own volition. Certain subscribers filed an action in the state court to enjoin such increased rates. The company removed this action to the federal district court at San Antonio. The federal district court held, in an unreported case, that under such circumstances the Johnson Act did not apply and that the federal court had jurisdiction.

Texarkana is a border city and involves two municipalities, Texarkana, Texas, and Texarkana, Arkansas. Both communities are served by a single telephone exchange with franchises from both cities, each franchise providing that the rates should be the same in each community. Increased rates for Texarkana, Arkansas, were authorized by the Arkansas Public Service Commission. The city council for Texarkana, Texas, refused to grant any increase in rates for Texarkana, Texas. Regulation of local service rates under such circumstances is exempted from the provisions of the FCC Act. The company applied to the federal district court for the northern district of Texas for injunctive relief.

In an unreported decision the court held that such local telephone service was actually interstate commerce and under such circumstances the Johnson Act did not apply.

APPENDIX

Footnotes

[1] Re Elyria Teleph. Co. (1951).
[2] Elyria Teleph. Co. *v.* Ohio Pub. Utilities Commission (1953) 158 Ohio St 441, 98 PUR NS 246, 250.
[3] (1953) 1 PUR3d 18.
[4] (1954) 3 PUR3d 145, 147, 70 So2d 508.
[5] (1953) 100 PUR NS 170, 172, 173.
[6] (Ind Cir Ct) Cause 12499, unreported.
[7] 2 PUR3d 75, 91.
[8] (1953) 1 PUR3d 6.
[9] (1952) 254 SW2d 819.
[10] (1953) 256 SW2d 187.

Movement of Highway Trailers by Rail

By PHILIP H. PORTER*

IN Movement of Highway Trailers by Rail, ICC Docket 31375, the so-called "Piggyback Case," the Interstate Commerce Commission has dealt with what appears likely to be the most significant and important development to take place in transportation during the last year, if not in fact during the last several years.

The commission has just released its report, dated July 30, 1954, comprising declaratory orders issued under § 5(d) of the Administrative Procedures Act dealing with 12 specific legal questions involved in various plans of operation which either had been adopted or were under consideration by railroads.

The transportation of freight in highway trailers by rail is by no means a novel practice. Such service from 1926 to 1947 was furnished by the Chicago, North Shore & Milwaukee Railroad between Chicago and Milwaukee in order to compete with carriers by highway and water. The Chicago Great Western Railway inaugurated a similar service in 1936, principally for use by common carriers by motor vehicle between Chicago and the Twin Cities. In the following year the New York, New Haven & Hartford inaugurated a like service between Boston and New York, rendered both for private shippers and for motor common carriers.

As a matter of fact, in one form or another, the transportation of freight by railroad in the vehicles of another transportation agency—for example, in canal boats and farm produce wagons—goes back for more than a century.

HOWEVER, it was not until this year that stimulated by increasing highway-use taxes, motor carrier operating costs, and the pressing need of the railroads for increased traffic, the service has been offered in what promises to become of widespread and most significant proportions. Already the tariffs covering such service have been published and facilities provided by several of the trunk lines, both east and west, and it seems certain that the ferrying of these highway vehicles by railroad will shortly become a common feature of our transportation system.

This development has raised important legal questions with respect to the relationships, particularly between railroads and motor carriers, the terms and conditions under which the service may be lawfully offered under the Transportation Act, and the implications involved in the offering of the service; accordingly, on September 30, 1953, the New Haven Railroad, being uncertain as to the determination of such questions, petitioned the Interstate Commerce Commission for declaratory orders or rulings with respect to some 20 questions which it propounded.

Motor carrier associations in turn raised the question as to whether a railroad might lawfully, as a railroad, transport its own freight, that is freight moving under railroad bills of lading at railroad rates, contained in highway vehicles without securing a certificate authorizing such transportation under the Motor Carrier Act (Part II of the Transportation Act).

THE commission thereupon proposed under § 4 of the Administrative Procedures Act to issue a code of rules and regulations covering the rendition of such service by railroads, but upon challenge of its

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powers to issue such rules reverted to a declaratory order proceeding under § 5(d) of that act, with reference to 12 basic fundamental questions. It heard parties comprising various carriers, both rail and motor, and various individual shippers and shipper groups and has made its report.

THE essentials of the commission's rulings are as follows:

1. Railroads may, under tariffs open to the public, transport their own freight, both in line-haul service and for collection and delivery within terminal areas incidental thereto, without holding a motor carrier certificate, since such motor carrier certificates are provided and applicable only for operations over the public highways and the terminal services performed by railroads as incidental to their rail service are exempted from Part II of the act.

2. Such service may be made available to motor private carriers; that is, persons hauling their own property incidental to a non-carrier primary business, the trailers having a prior or subsequent movement by highway.

3. Contract carriers by motor vehicle may not use such services by railroad within the scope of their contract carrier permits. A contract carrier may, however, act as the duly authorized agent of the owner of the goods transported to ship by the rail service involved to points beyond the territorial scope of its permit.

4. A motor common carrier may not act both as a carrier and as a shipper of the same freight. Therefore, a motor common carrier may not use an open tariff to secure the trailer-on-flatcar service. A railroad, however, engaged in such service may establish through routes and joint rates with a motor common carrier whereby such service can be made available to the motor common carrier as a connecting carrier.

5. Railroads may transport under open tariffs freight-laden trailers on flatcars, the trailers having a prior or subsequent highway movement in freight-forwarder service, since freight forwarders stand in the position of shippers in their relation with railroads, but through routes and joint rates under the act cannot be made by railroads with freight forwarders.

6. Another question propounded by the commission which was not definitely settled was as to whether a railroad which provided the service under through-route and joint-rate establishment with motor common carriers might at the same time refuse to establish such service for private carriers and freight forwarders under reasonable and appropriate rates. The commission held that this question must be determined upon the facts of each case, since it depends upon whether or not the refusal of such service is reasonable. For example, the New York Central proposes to establish trailer-on-flatcar service between New York and Chicago, restricted to motor common carrier trailers which are to move in solid trains at speeds approximating passenger train schedules. In view of the fact that daily transportation of that character is to be conducted, shipper requests for the same service would probably be reasonable, but, as stated, the question is one which can be resolved only upon the facts of each case.

THERE are now under investigation by the Interstate Commerce Commission and in the process of being heard various tariffs covering the service involved in effect on several eastern railroads, including the B&O, Lackawanna, Erie, Nickle Plate, Pennsylvania, and the Wabash.[1]

While this may appear to be, as it is, primarily a railroad case, its importance to the independent trucking transportation agency is obviously vital and its importance is such that it seems somewhat more than merely appropriate to present it under this discussion heading.

[1] Trailers on Flatcars—Eastern Territory, I & S No. 6214.

Recent Airline Regulatory Problems

By H. TEMPLETON BROWN*

BRIEF reference has already been made to perhaps the most significant decision handed down during the past year in the field of public utility aviation law, Delta Airlines *v.* Summerfield (1954) 347 US 74, 3 PUR 3d 339.

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The issue in that case was whether the Civil Aeronautics Board should pay a subsidy to Chicago and Southern to make up losses incurred in its Latin American operations for which mail rates were then under consideration, despite the fact that Chicago and Southern's domestic operations for which mail rates had been separately and previously fixed showed operating profits and resulted in a higher rate of return than that orginally anticipated by the board when it fixed the rates for the domestic operation. The Supreme Court held in effect that in determining a carrier's need for subsidy such need had to be based upon the carrier's requirements as a whole and not upon the need of any one particular division. In short, the domestic earnings were to be taken into account in ascertaining the need for subsidy in the Latin American operations.

This decision is important because it upsets a long-established policy of the Civil Aeronautics Board of fixing separate rates for domestic and foreign operations where both services are operated by the same carrier. In a recent statement by the board before the Senate Interstate and Foreign Commerce Committee, in support of legislation to counteract the effect of the Supreme Court decision, the board pointed out that it opposed the offset principle because it felt that to apply such policy would so substantially burden the domestic operations of a carrier and so adversely affect its ability to compete domestically on equal terms with carriers conducting only domestic operations that it might well result in the loss of the carrier's incentive to continue international operations. Furthermore, the board felt that an offset policy would burden the domestic passenger and property rate structures in that economies obtained in domestic operations would not be fully passed on to the domestic travelers and shippers but would instead be in effect diverted to subsidizing international operations.

As in the case of many decisions which purport to settle important phases of the law, Delta Airlines *v.* Summerfield, *supra,* probably creates more problems than it has settled. The Supreme Court has had no occasion as yet to determine how to measure the excessive earnings of one division which are to be offset against the need for subsidy in other divisions. In the Summerfield Case, there was an assumption of the existence of excessive earnings. The Supreme Court may have cast the Civil Aeronautics Board in a new rôle in so far as customary public utility rate regulation is concerned—that of an agency determining what constitutes an excessive rate of return as distinguished from what constitutes a reasonable rate of return.

During the past year, the Supreme Court also had occasion to consider the issue of state taxation of interstate commerce by way of *ad valorem* taxes on aircraft engaged in interstate commerce. In Braniff Airways *v.* Nebraska State Board of Equalization and Assessment (1954) 347 US 590, 74 S Ct 757, the Supreme Court held that the authority to regulate interstate air transportation stemmed from the commerce clause of the Constitution and that the commerce clause does not prohibit state taxation of instrumentalities of interstate commerce despite assertions of national sovereignty over the air space above the United States contained in the Civil Aeronautics Act. The court further held that aircraft operating in and out of airports of Nebraska, even though only briefly, and on a limited basis, attained a taxable situs in the state for the application of an *ad valorem* tax on an apportionment basis. The court distinguished its prior holding in Northwest Airlines *v.* Minnesota (1944) 322 US 292, which permitted the state of domicile to tax the entire value of the carrier's aircraft fleet on the ground that no showing had been made in that case that the taxpayer's aircraft had acquired a taxing situs in any other state.

A CASE involving the validity of leases made by municipalities was recently decided in the state of California. The city of San Francisco, which had entered into a 20-year lease with Transcontinental & Western Air, Inc., for the use of certain facilities at the San Francisco airport, sought to increase the rates provided for in the lease. When the matter was taken to court, the United States district court for the northern district of California, in Trans World Airlines *v.* City and County of San Francisco (1954) 119 F Supp 516, held that the city of San Francisco in furnishing common use facilities at the airport, such as runways, taxiways, landing aprons, control tower facilities, and the like, was functioning as a public utility and that the rates for such fa-

cilities, even though already fixed by the long-term lease, were subject to unilateral adjustment by the public utility commission of the city of San Francisco, which had jurisdiction over public utilities and other properties owned by the city.

An interesting pending case is one in which Slick Airways, Inc., is seeking to recover from American, Transcontinental & Western Air and United Airlines the sum of $30,000,000 for alleged violation of the antitrust laws. Actions taken by the three defendants in proceedings before the Civil Aeronautics Board form in large part the basis for the complaint. Defendants have contended that primary jurisdiction in such a matter rested with the CAB and not the federal courts. In American Airlines *v.* Slick Airways (1953) 346 US 806, 74 S Ct 54, the circuit court, denying certiorari, left in full force and effect an opinion of the court of appeals for the third circuit which had denied review of a district court's refusal to dismiss the suit on this ground. The decision of the third circuit is in seeming conflict with that of the District of Columbia circuit in the case of S.S.W. Inc. *v.* Air Transport Asso. of America (CA DC 1951) 191 F2d 658.

SIGNIFICANT developments are not always decisional. Perhaps the most important development during the year in the field of air transportation has been the report and recommendations of the Air Co-ordinating Committee, designated by the President to undertake a comprehensive review of this nation's aviation policy. The report, which was issued in May, 1954, is too long to refer to all of its recommendations. Generally, in keeping with the present administration's over-all policy of economy, it advocates a more economical and a more self-sufficient air transport system for the nation. Thus, on the question of subsidy, the recommendation is:

> 1. Air-line subsidy policy must be properly related to over-all transportation objectives.

On the subject of route structures, the report recommends:

> 1. It should be the continuing policy of the Civil Aeronautics Board to adjust and develop air routes with the objective of achieving a self-sufficient air transportation system made up of units sufficient in economic strength to meet present national needs and be prepared for sound growth and modernization.
>
> 2. Plans should be developed for consolidation of trunklines into a more limited number of systems, capable of self-sufficient operation while carrying their fair share of uneconomical and developmental service.
>
> 3. The operation of uneconomic competitive services should be avoided or eliminated.

IN connection with the "feeder" air-line problem which has necessitated perhaps the major share of the nation's subsidy payments in recent years, the committee states:

> 1. The route structures and certificates of the various local service carriers should be adjusted to provide the maximum opportunity to improve their economic position, within the general scope of their intended type of operation. Where continued and significant progress towards self-sufficiency is not demonstrated by a local service carrier, its operating authority should be terminated in an orderly fashion. To the extent that services formerly provided by it are clearly required to meet a public need, such services should be furnished by another carrier capable of providing the service without cost or at a substantially reduced cost to the government. The program of route adjustments should be expedited in the light of the schedule to be established for an orderly phrased reduction and eventual elimination of subsidy support for the local service carriers.

WITH respect to the troublesome problem of the irregular air carriers which were authorized to operate by an exemption rather than by certificates of public convenience and necessity, the committee's findings, in part, are as follows:

> 1. The concept of nonscheduled service does not provide a meaningful basis for exempting route-type passenger services from the normal certification requirement. In the future, there should be no general use of the exemption authority as a basis for authorizing common carrier transpor-

tation to individually ticketed passengers on large transport planes.

2. Those operations of the large irregular carriers which represent a supplementary type of service, such as bona fide charter and contract operations, should be encouraged. A new type of certificate should be developed for such operations, providing suitable flexibility in terms of areas to be served.

These and other recommendations made by the committees have met with opposition as well as with support. It will be interesting to see to what extent they are in fact followed by the Civil Aeronautics Board.

Co-ordination of Federal and State Regulation in Public Transportation

By OWEN CLARKE*

PROFESSOR Crosskey of the University of Chicago Law School, in his recent work "Politics and the Constitution in the History of the United States," has provoked a considerable storm of controversy in the book reviews of legal periodicals by advancing a new interpretation of the commerce clause of the federal Constitution which would abolish the present distinction between interstate and intrastate commerce. While I have no intention of entering the arena myself, the Crosskey thesis has some interest in connection with the subject assigned to me on this program.

A colleague of Professor Crosskey, Professor Sharp, also of the University of Chicago, more sympathetic with his views than some other critics, has this to say in a review of the work in the March, 1954, issue of *Columbia Law Review:*

> By voluminous and carefully organized lexicographical evidence and by an examination of eighteenth century ideas about commerce and government, Mr. Crosskey establishes that it was "gainful activity among the human groups known as states" that was subject to regulation by Congress under the commerce clause. Decisions have now gone almost as far, in upholding acts of Congress under the commerce clause, so that part of Mr. Crosskey's material has become almost obsolete as he has been writing (over the last sixteen years). . . .
>
> Again Mr. Crosskey's argument is not as remote from current developments as it may seem at first glance. . . . The pressures which have produced the negative implications of the commerce clause increasingly push toward comprehensive and systematic congressional regulation superseding and limiting state regulation and taxation interfering with internal freedom of trade.

IF the learned professors are right, it is perhaps a waste of time to discuss state regulation of transportation even in coordination with that of the federal agency. However, your invitation to me implies a belief that this is a subject of at least some current interest, and I shall proceed accordingly without undue emphasis on the legal aspects of the question as distinguished from what might be called the human or psychological side.

Public transportation is the life stream of commerce, and commerce is the vital force which has welded our people into a great and strong nation. As our commerce has expanded to meet the changing and growing needs of our people—as it has been encouraged or hampered or diverted or monopolized by tremendous human urges and desires—as it has felt the effect of new philosophies of government or new theories of economics, so too, our public transportation has encountered all of the changing phases that mark the history of American enterprise. It is not surprising, then, that the sixty-seven years which have passed since enactment of the Act to Regulate Commerce, comprise a panorama of legislation, administration, and litigation which has deeply probed and tested the concept of a dual form of government.

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IT is the purpose of this paper to view that panorama—to appraise the relationship which has existed during those sixty-seven years, between the state commissions and the Interstate Commerce Commission, and to draw some conclusions concerning the measure of success that has been achieved in co-ordinating state and federal regulation in the field of public transportation.

By way of historical background, let me remind you that the states had undertaken to regulate transportation some years before Congress decided to exercise its powers in that field. The first state railway commission was established in Rhode Island in 1839. The early commissions were generally of limited jurisdiction, some being engaged primarily in safety regulation and others performing only supervisory functions. Then stronger state commissions began to emerge. The Massachusetts commission, established in 1869, and the commissions established in the western prairie states in the 1870's, as an outgrowth of the Granger movement, were potent forerunners of the state commissions we have today. But although state commissions preceded the Interstate Commerce Commission, there was by no means complete and comprehensive state regulation in those early days. Twenty states and territories had no railroad commission of any kind in 1887.

IN that year, after prolonged consideration, and spurred by the decision of the Supreme Court in the Wabash Case, holding that the states had no power to regulate interstate commerce even as to the portion thereof taking place within the geographical boundaries of the state. Congress enacted the original Act to Regulate Commerce.[1] It was framed carefully to preserve the demarcation between interstate and intrastate commerce, and the name given to the regulatory agency then established makes that clear. If the agency had been created thirty years later, in all probability it would have been called the Federal Transportation Commission, a name much more descriptive than Interstate Commerce Commission.

Until about 1911 the dual systems of regulation existed peacefully side by side with only a few rumblings of dissatisfaction. That year marked the beginning of the litigation which led to the momentous decision of the Supreme Court in the Shreveport Case.[2] The commission had ordered Texas carriers to "cease and desist from charging higher rates upon any commodity from Shreveport into Texas than are contemporaneously charged for the carriage of such commodity from Dallas toward Shreveport for an equal distance." In sustaining this order, the Supreme Court held that the commission had the power to remove discriminations between persons and localities resulting from intrastate railroad rates.

Speaking through Justice Hughes, the court said:

> . . . Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field.

WHILE Justice Hughes' opinion is properly recognized as a landmark, unfortunately it overshadows the commission's report, 23 ICC 31, written by Franklin K. Lane, an able lawyer and writer. Students of this subject who are interested in the dramatic elements involved will find it worth while to look at Commissioner Lane's report and the various separate expressions to appreciate the profound impact of the revolutionary question there presented on the minds of the seven members of the commission, who were divided four to three. It is not without interest that two of the participants were former state commissioners, Meyer of Wisconsin, who voted for the report, and McChord of Kentucky, who dissented.

The Shreveport decision brought into sharp focus the fact that the economy of the country had developed to the point where similar conflicts between state and federal authority increasingly important were to be expected. In 1920 Congress recognized the need of legislation to meet this problem. It, therefore, enacted § 13(4) giving the Interstate Commerce Commission power to prescribe intrastate rates, fares, and charges

[1] Wabash, St. Louis & Pacific Ry. Co. *v.* Illinois, 118 US 557.

[2] Houston & Texas Ry. *v.* United States, 234 US 342.

necessary to remove undue preference and prejudice between persons or localities in intrastate commerce on the one hand and interstate commerce on the other, or "undue, unreasonable, or unjust discrimination against interstate or foreign commerce." This provision incorporated the principle of the Shreveport Case into statutory law and went considerably further by forbidding what are popularly known as revenue discriminations against interstate commerce as a whole.

Unquestionably, § 13(4) was bitter medicine for the state commissions. To make it somewhat more palatable for them Congress coupled it with § 13(3), which provides for co-operation between federal and state commissioners in various respects, including the holding of joint hearings.

THE effect and purpose of the co-operative provisions of the act have been stated by Dr. Martin L. Lindahl, in a very comprehensive article in the *Michigan Law Review*, Vol. 33, No. 3, January, 1935, entitled "Co-operation between the Interstate Commerce Commission and State Commissions in Railroad Regulation," as follows:

> These provisions grant to the commission in broad terms the authorization sought by it and the state commissions. In order that the state authorities may be aware of any proceedings bringing into question their prescribed rates or regulations, the commission is required to give them due notice, thus insuring them an opportunity either to intervene in behalf of local interests or to suggest co-operative action. Joint hearings and conferences are provided for at the discretion of the commission. It was contemplated that the method of harmonizing conflicting views through deliberations upon a joint record, already successfully tried in rate cases prior to 1920, would be employed as the regular procedure. Utilization of the facilities and services of the state commissions, while not mandatory upon the commission, is designed to enhance the efficiency of administration and to promote co-operation in general.

Concerning these co-operative provisions, when the bill was before the House committee, Chairman Clark of the ICC said:

> The idea under the proposed amended act is that every reasonable feasible effort shall be made to bring the conflicting views of the state commissions, if they do conflict, and the views of our own commission into harmony through a very careful investigation which all are invited to participate in, and in which everybody would be heard, and in which every reasonable effort would be made to reach a mutually acceptable understanding; but the possibility of inability to reach such an understanding would be protected by a reservation of the power to finally decide it, if necessary, by the federal tribunal. (Hearing on HR 4378, 66th Congress, page 27.)

THE first proceeding in which state commissions participated following enactment of the Transportation Act of 1920 was Ex Parte No. 74, a general freight and passenger rate increase case. Three state commissioners took part in the proceedings, concurred in the conclusions reached, and issued a statement to state commissions throughout the country expressing their approval of the report.

The order in Ex Parte 74 was immediately followed by a nation-wide movement of the carriers to obtain authority for similar increases in intrastate rates. In some instances the railroads confined their case before state commissions to the presentation of the Interstate Commerce Commission order and presented no other evidence justifying the requested increases. The responses of the state commissions to these applications varied. Some commissions granted the increases in full, others in part, and some refused relief entirely. The hands of some commissions were tied by state statutes fixing maximum rates which would be violated by percentage increases equal to those ordered by the Interstate Commerce Commission. The net result was that the railroads with respect to a large body of state rates failed to obtain authority to make percentage increases corresponding to the interstate increases.

THE railroads, therefore, appealed to the Interstate Commerce Commission for relief, and the latter body asserted its mastery of the situation in no uncertain terms. It said in substance: The transportation of freight and passengers within the borders of any state at general rate levels below the levels

established by the commission for interstate commerce is a discrimination against interstate commerce as a whole and must cease. You, the carriers, must remove this discrimination at once by increasing your intrastate rates to general levels corresponding to those authorized by us for interstate commerce. The commission consistently and ruthlessly carried out this policy in a series of orders regulating intrastate rates in twenty-five different states contrary to state statutes or the orders of state regulatory bodies.

The excitement among state authorities was intense. They believed that these new orders, if sustained by the courts, would destroy state power to regulate state rates. They denied that Congress had authorized the ICC to take such action. Furthermore, they denied the constitutional right of Congress to confer such authority on the commission. With the courage of their convictions, some of the states proceeded to enforce their lower scale of rates.

CONFRONTED with the conflicting demands of two masters, the railroads resorted to the courts to restrain the enforcement of state laws and orders contrary to the orders of the Interstate Commerce Commission. It squarely raised the issue of the existence of federal power to regulate wholly intrastate rates in order to provide sufficient revenues to maintain an adequate national system of transportation. This power was sustained in the appeal of the Wisconsin Passenger Fare Case.[3]

The decision in that case is noteworthy, however, for an entirely different reason. Speaking through Chief Justice Taft the Supreme Court made the significant observation that federal and state commissions should solve their differences over the conference table. Accordingly, the same year the ICC and the National Association of Railroad and Utilities Commissioners entered into what is known as the Co-operative Agreement with the object of carrying out the real intent and purpose of § 13(3). That agreement pointed out the common purpose of the dual system of regulation; "namely, the maintenance of a transportation system which will in all respects best meet the public needs," and expressed the belief that the various commissions could, and should "work together for its attainment without conflict or resort to litigation."

THE original agreement was supplemented in 1925. The following paragraphs from the supplemented agreement are worth noting:

> The prime essential to such co-operation is realization of the nature and difficulties of the common problem. The state commissions realize that the railroads form a national transportation system and that the public interest demands a rate structure, state and interstate, as simple and harmonious as practicable. The Interstate Commerce Commission realizes that there is danger in overcentralization of authority, that the field of regulation is vast, and that the state commissions are often better informed than itself in regard to local conditions and local needs.
>
> In one of its most important aspects, co-operation must look forward to and have in view the avoidance, so far as the public interest will permit, of orders under § 13 of the Interstate Commerce Act, affecting intrastate rates.

The co-operative agreement was a recognition on the part of the Interstate Commerce Commission and of the state commissions that they owed it to the people whom they served to make our dual system of government work as harmoniously and efficiently as if there were no division of powers between the nation and the states.

IT was, of course, hardly to be expected that such lofty aims would be completely successful. There have been many cases before the commission under § 13(4), a considerable number of which have gone on to the courts. The Supreme Court, therefore, has frequently had occasion to interpret this statute. Since the questions involved usually have prominent economic and political overtones, the court's various pronouncements have not always seemed consistent. The long list of decisions by the ICC and the courts involving § 13(4), however, should not obscure the considerable degree of success attained through the machinery provided by § 13(3). "Peace hath her victories no less renowned than war."

The co-operative agreement set forth detailed arrangements for joint hearings, argu-

[3] Wisconsin R. R. Commission *v.* Chicago, B. & Q. R. Co. 257 US 563.

ments, and conferences. It opened the way for any state to suggest co-operation in any proceeding or matter before the Interstate Commerce Commission, and likewise enabled the federal agency to suggest co-operation to a state commission in any matter pending before such body which might have an effect upon matters subject to the jurisdiction of the ICC.

IN most of the important rate cases since the adoption of the co-operative procedure, particularly those of broad territorial scope, members of state commissions chosen by the NARUC from a panel maintained by it sit in the hearings with members of the ICC at which the evidence is presented and later at the oral argument. Such state representatives are invited to the conference of the ICC when the decision is under consideration and thus are afforded the opportunity to state their views, but they, of course, do not vote on the adoption of the report. Typical of such proceedings are the general revenue cases which resulted from the increases in railroad operating expenses after the war and the pending investigation of class rates in Mountain-Pacific territory.

Also, from time to time, the ICC has cases of regional interest only which are linked with companion proceedings before one or more state commissions. In such instances a representative of the state commission, occasionally a commissioner, sits with our examiner. The hearing is joint with two coordinate hearing officers and the record is common. There is an opportunity for the two officers to confer during the hearing. Thereafter the interested state commission is informed of the ICC proposed report before it is served and of later developments. Personal conference at this stage is usually not deemed necessary, but there may be an interchange of views by mail. Rarely do serious differences of opinion develop.

AN illustration of the cases which are adapted to co-operative procedure is afforded by those involving commutation passenger fares. These are usually troublesome matters because of the strong consumer resistance to rising charges for commuter travel. Proposals for increased fares commonly involve interstate as well as intrastate transportation, and joint hearings are therefore desirable to save time and money. Although it might naturally be expected that the state commission involved would be sensitive to organized local pressure against fare increases, the fact is that in a number of such proceedings it has been possible to work out a harmonious and reasonable adjustment of interstate and intrastate fares through the co-operative procedure.

Perhaps the outstanding merit in this procedure lies in the opportunity which it provides for the members of the respective commissions or of their staffs in the course of hearings or conferences to discuss the problems involved from their different points of view and thus to acquire a broader perspective.

These contacts promote friendly relations and a mutual understanding of the problems which state and federal officials have to meet. During the last fiscal year the co-operative procedure was utilized in only eighteen railroad cases. Qualitatively, however, the effect of state participation was much greater than the figures would seem to indicate.

BASICALLY, the federal agency is concerned with over-all national aspects of transportation questions. The state commission, on the other hand, necessarily is better informed as to local problems. This difference in point of view is usually at the root of such regulatory disagreements as arise from time to time. In certain states the commissioners are elected by popular vote for comparatively short terms. It is sometimes suggested that this method of choice affects the independence of judgment by the incumbent. Then there is the countersuggestion that the general atmosphere in Washington tends to make an appointive official unmindful of conditions near the grass roots. When a state commission declines to approve a general rate increase for a given commodity, on which the interstate rates have been raised, it is often suspected that the purpose is to foster the local economy. In the same circumstance, there is the frequent charge that the ICC is misinformed as to the probability of higher revenue from an increased rate and ignores the adverse effect on the volume of traffic. I cite these points merely to indicate complicating features of the situation which have been somewhat conspicuous in the past but, in my opinion, are now diminishing.

RECENTLY there have been signs of incipient conflict between state and federal regulatory jurisdiction over the curtailment of unprofitable railroad passenger service. The ICC has expressed concern over the growing passenger deficit and has recognized the general need of doing away with trains which no longer earn their keep. Barring the possibility of undue prejudice and preference railroads are free to make changes in their interstate service without approval by the ICC, but usually the permission of the state commissions is necessary where intrastate service is involved.

Occasionally the railroads are dissatisfied with what they consider unduly restrictive action on the part of some state commissions with respect to discontinuance of passenger service, and have urged Congress to vest the ICC with a kind of appellate jurisdiction. This request, it may be observed, is in sharp contrast to the railroads' general view that there should be less federal regulation.

A much more constructive approach to the problem of passenger deficits, in my opinion, is that being undertaken by the joint committee of the Interstate Commerce Commission and the National Association of Railroad and Utilities Commissioners. As a result of their efforts, substantial progress has been made in removing trains where the revenues fail to cover crew wages, fuel, locomotive and car repairs, lubricants, and train supplies and expenses. The extensive studies of this committee have been helpful, not only to regulatory bodies but also to railroad management. Certainly, here is a prime example of effective co-ordination and co-operation in transport regulation.

VERY recently, it has been urged that §13(4) also provides a remedy in abandonment cases. The ICC has instituted an investigation under that section to determine whether the refusal of the New Jersey Board of Public Utility Commissioners to allow a small railroad in that state to discontinue a suburban train—a decision sustained by the state courts—causes unjust discrimination against interstate commerce. This proceeding presents a novel and interesting legal question, as to which, of course, I can express no personal opinion at this time.

The enactment of the Motor Carrier Act of 1935 opened a new field of co-operation between the Interstate Commerce Commission and the state commissions. Prior to 1925, the states acted upon the theory that in the exercise of their police powers, and as the owners of the highways within their respective borders, they could regulate all use of such highways, irrespective of the character of the commerce moving thereon. In 1925, however, came the decision of the United States Supreme Court in Buck *v.* Kuykendall[4] that the states could not regulate the business of interstate motor carriers nor prevent their operation over public highways. This decision was judicial sanction for the patently unfair condition whereby a wholly unregulated interstate carrier might operate indiscriminately and without restraint over the same highways as the intrastate carrier subject to the most rigid state regulation.

AFTER ten years of vigorous opposition and extended hearings, Congress finally recognized the absolute necessity of federal regulation in this field and enacted the Motor Carrier Act, a special feature of which is the provision for formal co-operation with state regulatory bodies through the medium of joint boards. While ultimate authority in all matters rests with the commission, it is directed, when the matter at issue involves not more than three states, to refer to a joint board for appropriate proceedings matters which involve applications for certificates, permits, or licenses; the suspension, change, or revocation of such certificates, permits, or licenses; applications for the approval and authorization of consolidations, mergers, and acquisitions of control or operating contracts; complaints as to violations by motor carriers or brokers of the general regulations established under §204(a); and complaints as to rates, fares, and charges of motor carriers or the practices of brokers. When the matter to be considered involves more than three states, the commission has the option of referring it to joint boards. The commission itself appoints the joint board from a list of nominations supplied by the state commission or the governor. A joint board is composed of one representative from each state concerned in the proceeding, usually a commissioner or some other representative of the state public service commission. In acting

[4] Buck *v.* Kuykendall, 267 US 307, PUR1925C 483.

upon matters referred to them, joint boards are vested with the same rights, powers, and jurisdiction as the members or examiners of the commission. Orders recommended by a joint board become effective as orders of the commission unless exceptions are filed within twenty days after service upon interested parties, or such other time as the commission may decide upon, or unless stayed by the commission itself.

FOR this administrative design the state commissioners themselves are mainly responsible. From the time of earliest congressional consideration of motor carrier regulation, the state commissioners contended that their services should be utilized. They based this contention on the following grounds: (1) Decentralized administration is required by the essentially local character of motor carrier operations and regulatory problems; and (2) since motor carrier regulation had been pioneered by the states, the experience of the state commissioners should be made use of directly by giving them important administrative functions.

Since this plan represented a concession to state interests, it was expected that the state commissions would be anxious to assume the functions assigned to them. However, because of the heavy volume of work and the substantial demands upon their time many state commissioners now feel that their participation in federal regulation is more of a burden than a privilege. Some states are participating only in matters involving passengers. Other states rarely participate in any joint board hearings and still others participate in only about half of the cases assigned to them.

It seems quite apparent, therefore, that the state commissions are failing in their duty by not participating in interstate motor carrier regulation to the extent contemplated by the co-operative provisions of the act. By the same token, the Interstate Commerce Commission is at fault for not making greater use of the co-operative features of §13(3) in rail proceedings.

THE conclusion is inescapable, however, that what co-operation there has been in both rail and motor carrier cases has clearly improved relations between the ICC and the state commissions and that the public interest has been greatly served thereby. A system of co-operation cannot be expected to eliminate all conflicts between the states and the federal government, for so long as there continues to be marked differences in the economic and industrial characteristics of individual states and regions, the basis for divergent interests will prevail. But co-operative procedure has proven to be a valuable aid in enlightening regulatory bodies with regard to both local and national conditions and in effecting a reconciliation between the various conflicting interests through joint consideration and compromise.

Needless to say, this has been a very sketchy discussion of one small facet of the broad problem inherent in the division of sovereignty between the federal and the state governments. This problem has been with us throughout our national existence and so far as we can now see it will not disappear. We have a clear lesson of history showing that our peculiar political system will function successfully if we have intelligent leadership guided by accurate factual information and detached from vitiating emotion. This spirit, I believe, is manifest in those who are concerned with co-ordinating federal and state regulation of transportation.

Legal Problems of the Railroad Passenger Deficit

By ELDON MARTIN*

THIS is a subject which I approach with humility and trepidation because, as the Supreme Court of the United States said in a related case,[1] it presents one of those problems of transportation economics which involve " . . . the exercise of judgment born of intimate knowledge of the particular activity and the making of adjustments and qualifications too subtle for the uninitated." I do not

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pose as an expert. Few, if any, exist in this field. But I do know that the recurring and mounting deficits of the American railroads, from their passenger service operations, constitute a problem of vast importance not only to the railroad industry but to the transportation economy, and, indeed, the national defense, of the United States.

Last year, according to the Interstate Commerce Commission, the railroad passenger service deficit was almost $705,000,000,[2] equivalent to 38.8 per cent of the railroads' income from freight services. In other words, out of every dollar earned by the railroads in the transportation of freight, almost 40 cents was eaten up by the passenger deficit. In fact, for the seven full years since the war, 1946-53, the average ratio of passenger deficit to freight income is a little over 40 per cent.

Now, before you all rush out to sell your railroad securities, let me hasten to say that the passenger service deficit, as computed by the Interstate Commerce Commission, is based upon an accounting formula which allocates to each class of railroad service all expenses which the commission thinks reasonably should be attributed to it, including proportions of overhead, general expense, property taxes, etc. The passenger deficit reported annually by the ICC does not represent the amount of money which the railroads could save if no passenger service whatever were provided. Such a figure, of course, would be substantially lower. I have seen no satisfactory evidence as to the actual losses properly chargeable to the operation of railroad passenger service, nor any sound statement of the savings, if any, which would result if all passenger service were abandoned. The so-called out-of-pocket accounts, in the ICC formula, represent about 53 per cent of total charges assignable to passenger operating expenses, and any such rough calculation is subject to criticism, but even if we discount these deficits by 50 per cent or more —and they should be discounted to some extent in any realistic consideration of their practical effects—they still constitute a serious drain upon the railroad industry, upon shippers of freight, and, indeed, upon the whole transportation economy of the country.

Whether the passenger service deficit is over $700,000,000, as reported by the ICC, or only half that amount, or a still lesser amount, it is a loss which no industry should be required to sustain, and a loss which may threaten the ability of the railroads to provide transportation adequate to meet the needs of the commerce and the national defense of the United States. This is true because the railroads are compelled to operate on a very small margin of profit, without much control over either income or outgo, and because they have demonstrated, more than once, how vital they are to the national economy and the national defense.

But this is enough to emphasize the importance of the railroad passenger deficit, which has been called "the most challenging problem in the regulatory field."[3] I come now to the "legal problems."

When I was asked to talk to you on this subject, I demurred with the statement that the passenger deficit is primarily a political problem, as distinguished from a legal problem, but I was informed that great scholars of the law, like you gentlemen, are not interested in the hard political facts of life but are concerned instead with the beautiful intricacies of abstract legal principles, and so —from this ivory tower—let me take you on a tour through some of the most complicated and confused legal principles which ever tortured the mind of a railroad lawyer.

But first you should know how these cases arise. Although Congress in 1920 delegated to the Interstate Commerce Commission the authority to decide whether or not a railroad should be permitted to abandon all or part of its trackage, it has been generally assumed, and held, that power was reserved in the states to decide whether or not a particular passenger train, for example, may be discontinued for lack of adequate patronage and earnings, notwithstanding the continued operation of freight service over the same trackage. A case is now before the Interstate Commerce Commission in which this jurisdictional question will be reconsidered.[4]

Bills have been introduced in Congress which would give the Interstate Commerce Commission power to override adverse state decisions in such cases.[5] But at the moment, a railroad which wishes to discontinue the operation of an unprofitable passenger train generally must obtain authority to do so from a state commission. If relief

is denied by the state commission, an appeal generally may be taken through the state courts and thence, if certiorari is granted, to the Supreme Court of the United States. Until recently, it has been thought that relief also might be obtained through the federal courts, but this avenue was almost closed by a recent decision of the U. S. Supreme Court.[6] Generally speaking, relief from an adverse state commission order, in a "train-off" case, must come through the state courts.

In all such cases before state commissions the basic issue is whether or not "public convenience and necessity" (a much abused phrase) permit discontinuance of the particular passenger train service under consideration. This somewhat vague standard makes room for countless political pressures, for spectacular performances by acrobatic accountants, for sophistry by a commissioner who seeks to justify a predetermined political opinion, for the admission of much irrelevant and incompetent evidence, and for other attributes of the administrative process which do not appeal to the true lawyer. But, theoretically at least, the issue in such cases is whether the railroad should be permitted to cease operation of a particular passenger train, as prayed in its application, or whether the "public interest" (another much abused phrase) requires the continuance of such service.

To reach the jugular vein of this legal problem, I think we ought to get down to a case in which it is conceded, or established by competent evidence, that a particular passenger train cannot be operated without sustaining an out-of-pocket loss, because the legal problem is thus sharply presented, and because it has been held, not infrequently, that a carrier *can* be required to sustain such out-of-pocket losses if public convenience and necessity, or the public interest, require such a sacrifice.

The right to private property, and the principle that such property shall not be taken by the sovereign without due process, have been recognized generally since the Magna Charta. But the earliest English Law Tracts[7] state a principle of the common law which was paraphrased over two hundred years later by our own Supreme Court, in Munn *v.* Illinois (1877) 94 US 113, 126, as follows:

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

Lord Ellenborough in Aldnutt *v.* Inglis, 12 East 527, said in 1810:

> There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms.

Of course, in a broad sense, this is simply to say that when private property is devoted to a public use, it is subject to public regulation. No one questions that doctrine, but whether these sound principles can be stretched to validate a state order which requires continued operation of a railroad passenger train at an out-of-pocket loss, presents a different and more difficult question. It would serve no purpose to consider further the early English cases, or the extent to which the common law was changed or affected by the adoption of the Fourteenth Amendment to the Constitution of the United States.

Some of our early cases squint in the direction of a holding that such an order might have been invalid, even in the early days of railroading. For example, in Brooks-Scanlon Co. *v.* Louisiana R. Commission, 251 US 396, at page 399, PUR1920C 579, at page 581, the court said:

> A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage.

See also Railroad Commission Cases (1886) 116 US 307, 325, 331, wherein the court said that "the state cannot require

a railroad corporation to carry persons or property without reward"; Dow *v.* Beidelman (1888) 125 US 680, 689; Georgia R. & Banking Co. *v.* Smith (1888) 128 US 174, 179; Chicago, M. & St. P. R. Co. *v.* Minnesota (1890) 134 US 418, 458; Budd *v.* New York (1892) 143 US 517, 547, in which the court held that the state power over grain elevators and warehouses was *not* "a power to compel the doing of the services without reward"; and Smyth *v.* Ames (1898) 169 US 466, 541, wherein the court said that "The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business. . . ."

In Northern P. R. Co. *v.* North Dakota ex rel McCue, 236 US 585, 595, PUR1915C 277, 284, the court said:

> As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage.

Again at pages 595, 596 of 236 US and page 285 of PUR1915C:

> The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement. In such a case it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain.

In Norfolk & W. R. Co. *v.* West Virginia, 236 US 605, at pages 608, 609, PUR1915C 293, at page 295, the court said:

> . . . the devotion of the property of the carrier to public use is qualified by the condition of the carrier's undertaking that its services are to be performed for reasonable reward; and that the state may not select a . . . class of traffic, and . . . compel the carrier to transport it either at less than cost, or for a compensation that is merely nominal.

ALTHOUGH most of the cases to which I have just referred involve the fixation of rates or charges for a public utility service, as distinguished from the compulsory operation of a railroad passenger train, and although the quotations are, to that extent, somewhat out of context, the foregoing decisions would seem to suggest that a state order requiring continued operation of a passenger train at an out-of-pocket loss, might have been regarded—even in the early days of railroad operations—as an unconstitutional taking of railroad property, contrary to the provisions of the Fourteenth Amendment.

But let me refer you to another group of cases, somewhat more directly in point, which hold in effect that such orders, at least at the time of their entry, did not violate the constitutional guaranties of due process, just compensation, and equal protection of the laws.

In Atlantic Coast Line R. Co. *v.* North Carolina Corp. Commission, 206 US 1, decided in 1907, which involved an order requiring the railroad to provide passenger train service at less than cost, the court undertook to distinguish certain of the earlier cases involving rates and charges, such as Smyth *v.* Ames, *supra*, and said, at page 26:

> . . . as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although, by doing so, as an incident some pecuniary loss from rendering such service may result.

IN Missouri P. R. Co. *v.* Kansas ex rel Taylor (1910) 216 US 262, the court considered a state order directing operation of a passenger train over a branch line within the state of Kansas. The court upheld the order against the railroad company as "a necessary consequence of the acceptance and continued enjoyment of its corporate rights" and went on to say (page 279):

> . . . it cannot be said that an order compelling the performance of such duty at a pecuniary loss is unreasonable.

In Chesapeake & O. R. Co. *v.* West Virginia Pub. Service Commission (1917) 242 US 603, the court upheld an order of the West Virginia Public Service Commission requiring inauguration of certain branch-line passenger service. It was not entirely clear that the service would be unremunerative, and the court considered other facts, but at page 607 the court said:

> One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the state, and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss.

In Mississippi R. Commission *v.* Mobile & O. R. Co. 244 US 388, PUR1917E 791, the court held invalid an order of the Mississippi commission directing restoration of certain passenger train service which had been discontinued by the carrier. This action apparently resulted from the precarious financial condition of the carrier, the small traveling population to be served, etc., but the court also said (page 391 of 244 US and page 793 of PUR1917E) that

> . . . regulation may extend in a proper case to requiring the running of trains in addition to those provided by the carrier, even where this may involve some pecuniary loss.

SINCE these cases to which I have just referred, the most recent of which was decided almost forty years ago, the Supreme Court of the United States has not considered, on the merits, the important constitutional question of whether a state may compel a railroad to operate a passenger train at a loss.[8]

This is a fact of the utmost significance because, as I shall try to show you, conditions have so changed in the past thirty or forty years that it is of *no consequence* now whether certain of the older precedents were right or wrong, and likewise of no consequence that possible conflicts may appear in different groups of prior decisions. In other words, it may be conceded, *arguendo,* that prior to 1920 or thereabouts a carrier could be required, in a proper case, to continue the operation of a passenger train at a loss, but I suggest that such a decision, *under present conditions, properly presented to the court,* would be contrary to the provisions of the Fourteenth Amendment. In other words, if a railroad can now prove that the operation of a particular passenger train results in an out-of-pocket loss, it is inconceivable to me that any court or commission, lawfully or properly, can compel its continued operation. Now, what are the changed conditions which prompt such a bold statement?

IN the first place, all of the older precedents rest upon the fundamental proposition that although a common carrier must submit to public control so long as it continues to exercise its charter rights, and hence may be required to perform some service at a loss, it may avoid such losses, if it so desires, by surrendering its charter and discontinuing its operations. Prior to 1920 this provided a real alternative. But, as a practical matter and under modern conditions, this alternative no longer exists except in connection with the operations of a few very small railroads. Complete abandonment of a railroad is no longer a matter of right. Since 1920 a railroad may abandon its operations, in whole or in part, only after having first obtained authority from the Interstate Commerce Commission.

But, apart from this statutory requirement, the cold, hard fact is that under present conditions a major trunk-line railroad—of the type which performs over 90 per cent of the railroad service in this country—simply cannot as a practical matter surrender its charter and abandon its operations. Instead, as everyone knows who is familiar with railroad history during the Great Depression, when a trunk-line railroad "goes broke" the stockholders are liquidated in the bankruptcy courts, and the bondholders take over as the new owners, but the railroad, as a practical necessity, continues its operations. Thus, one of the cornerstones of the older precedents has crumbled, and one of the important reasons for the old rule has ceased to exist.

MORE important, however, is the fact that underlying the early precedents, which attempt to justify the compulsory performance of unprofitable service by a common carrier, is the theory of a monopoly grant by the sovereign. You will recall the words of Lord Ellenborough in Aldnutt *v.* Inglis, *supra,* referring to a ferry operator, to the effect that

> . . . if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a

monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms.

In the days prior to World War I, it must be conceded that the railroads enjoyed a substantial monopoly in land transportation. The horse-drawn vehicle, often sunk in the mud, was the principal mode of land transport and the local passenger train was a practical necessity. But what is the situation today?

In 1916, the railroads of the United States furnished 98 per cent of the total intercity passenger miles, whereas, in 1950, the latest year for which total figures are available, the railroad proportion of total intercity passenger traffic was only 7.9 per cent.[9]

In 1910, there were about 197 persons per motor vehicle in the United States; in 1920, there were about eleven persons per motor vehicle in the United States; and in 1947 there were only 3.8 persons per motor vehicle in the United States. Current statistics are not available, but upon the basis of an assumed national population of 160,000,000 and 1951 motor vehicle registrations, excluding publicly owned vehicles, of 51,291,597, it may be assumed reasonably that today a motor vehicle is in operation for every three persons in the United States.

A vast network of improved highways has been constructed throughout the United States during the past thirty-five or forty years. Highway statistics for the earlier years are fragmentary, but in 1921 only 387,000 miles of rural roads were surfaced, whereas, by 1952, the total surfaced mileage of rural and municipal roads was 2,070,000 miles.[10] Of course, a substantial increase has occurred since 1952.

But it is unnecessary to burden you with further statistics. Every schoolboy knows that the railroad monopoly of land transportation, which was another cornerstone of the earlier legal precedents, long since has disappeared. The rules must fall with the reasons which formerly supported them.[11]

Finally, and as a corollary to the transportation revolution which has occurred in this country, that much-abused phrase "public convenience and necessity" needs reappraisal in the light of changed conditions. According to the authorities,[12] the phrase means an "urgent public need," not the needs of "the individual or a number of individuals." Under present conditions, with over 50,000,000 motor vehicles operating over more than 2,000,000 miles of improved highways in the United States, many of which parallel the lines of the railroad network, and considering the obvious convenience which inheres in the operation of the private automobile and the certificated motor carrier, can it now be said—as a matter of law—that an "urgent public need" exists for continued operation of any railroad passenger train with patronage so slight that it cannot even earn its out-of-pocket cost? The question answers itself.

Fortunately for the railroads, several recent court decisions recognize the need for a new judicial look at this important question in view of the changed conditions which have destroyed the foundations of the earlier legal precedents. I quote from a few of these cases:

In Chicago B. & Q. R. Co. *v.* Illinois Commerce Commission (1949) 82 F Supp 368, 373, the court said:

> The passenger transportation revolution wrought by the private automobile and certificated bus, in connection with a vast system of improved highways, has not only resulted in transferring the radically larger proportion of the passenger transportation needs and services from the local railroad passenger train to the highway, but the convenience afforded by the private automobile in connection with said highways has so outmoded the local railroad passenger train (exclusive of railroad suburban service) as to cause said local train service to become an obsolete form of transportation.

And at pages 377, 378, the court said:

> In determining whether public convenience and/or necessity requires the restoration of plaintiff's local railroad passenger trains . . . the rules announced in older legal precedents established prior to the transportation revolution wrought by the national system of improved highways and the widespread use of the private automobile, the certificated bus and truck, are no longer applicable, inasmuch as the widespread use of the motor vehicle on said

highways not only destroyed the railroads' former monopoly of the passenger transportation business, but it has also made the local railroad passenger train an obsolete form of transportation.

In Illinois C. R. Co. *v.* Illinois Commerce Commission (1951) 410 Ill 77, 101 NE2d 588, at page 593, the court said:

> In determining questions of public convenience and necessity today, consideration must be given to the fact that railroads no longer have a monopoly of transportation. Older decisions, requiring the continuance of particular passenger train services even though conducted at a loss, were rendered in a period when railroads provided the principal source of land transportation. Horse-drawn vehicles provided little if any competition. Today, on the other hand, railroads are in competition with bus and truck lines as well as private automobiles traveling over a vast system of improved highways built, not by private capital as is the case with rail carriers, but by public expenditures. They are in competition also with government subsidized waterways and, in recent years, with the expanding activities of airlines. In the light of such changed conditions it is a duty of the carrier to seek, and of the regulatory agency to permit, elimination of uneconomic services no longer needed or used by the public to any substantial extent. The reasons which originally may have provided justification for compulsory facilities maintained at substantial losses have largely disappeared today, rendering local train service in many cases an obsolete form of transportation. Recognition of such factors by regulating bodies not only results in financial benefit to the railroads but, by eliminating unnecessary passenger train service, makes possible more economical transportation for the public on the trains which remain in substantial demand.

In St. Louis-S. F. R. Co. *v.* Oklahoma (1950) 204 Okla 432, 230 P2d 709, the supreme court of Oklahoma reviewed most of the earlier precedents to which I have referred, explained why they cannot be applied under present conditions, and went on to say at page 715:

> When a common carrier is called upon to alleviate a mere public inconvenience in the matter of transportation, the cost to be incurred thereby is of paramount importance. If the maintenance of facilities necessary to relieve the situation will result in financial loss in performing the particular service wherein the inconvenience arose, to require such facilities would be to take the carrier's property without due process of law.

See also Southern R. Co. *v.* South Carolina Pub. Service Commission (1940) 195 SC 247, 10 SE2d 769; Arizona Corp. Commission *v.* Southern P. Co. (1940) 55 Ariz 173, 99 P2d 702; Re Chicago, B. & Q. R. Co. (1950) 152 Neb 352, 41 NW2d 157; Chicago, B. & Q. R. Co. *v.* Nebraska State R. Commission (1950) 152 Neb 367, 41 NW2d 165; Lynchburg Traffic Bureau *v.* Commonwealth of Virginia (1949) 189 Va 612, 54 SE2d 66; Texas & N. O. R. Co. *v.* Texas R. Commission (TexCivApp 1949) 220 SW2d 273.

These cases state the law as I think it is, and ought to be. They hold in effect that a state order which undertakes to compel continued operation of a railroad passenger train, which cannot be operated except at an out-of-pocket loss, is an unconstitutional taking of private property without due process of law.

But notwithstanding all this, certain state commissions, and occasionally an appellate court, continue to rely upon the older precedents, and deny relief under such circumstances.[13]

The courts and state commissions ought not to close their eyes to conditions which are well known to everyone. A railroad company has but limited powers of management. It has no final power to fix rates, therefore, little control over its revenue. Its control over expenses, particularly wages, is strictly limited. In managerial functions it is restricted by rules arising from contracts with powerful labor organizations. It is the duty of a carrier to seek, and the duty of courts and commissions to permit, the elimination of services no longer needed or used by the general public, which cannot be continued without pecuniary loss, Re Chicago, B. & Q. R. Co. (1950) 152 Neb 352, 41 NW2d 157, 164.

If the railroads, the state commissions, and the courts fulfill their duties in these respects, the railroad passenger deficit will gradually disappear; better passenger service will be provided on trains which are needed; and the railroads will thus be able to provide better and more economical transportation for the commerce and defense of the nation.

If they do not thus fulfill their duties, Congress must assert its paramount power over interstate commerce and take from the states the authority which they have so long exercised over local passenger transportation service. In other words, if local political pressures continue to control the decisions of certain state commissions, and if certain of the state courts cannot or will not follow the lead of their more judicious and enlightened brethren, and recognize the changed conditions which have destroyed the foundation of the earlier decisions on this subject, power over local passenger train service, like the power over railroad line abandonments, must be lodged with the Interstate Commerce Commission.

Footnotes

[1] New York *v.* United States (1947) 331 US 284, 335, 69 PUR NS 278, 309.

[2] $704,574,000.

[3] NARUC Report, 1952.

[4] ICC Docket No. 31566, Operation of Passenger Trains in New Jersey.

[5] S 281, 83rd Congress.

[6] Alabama Pub. Service Commission *v.* Southern R. Co. (1951) 341 US 341, 90 PUR NS 308.

[7] Lord Chief Justice Hale in his treatise *De Portibus Maris,* 1 Harg. Law Tracts 78.

[8] A case reached that court which involved that issue below, but it was disposed of upon procedural grounds (Alabama Pub. Service Commission *v.* Southern R. Co. (1951) 341 US 341, 90 PUR NS 308).

[9] See Chicago, B. & Q. R. Co. *v.* Illinois Commerce Commission (1949) 82 F Supp 368, 372, and "Report of the Special Committee on Co-operation with the ICC in the Study of the Railroad Passenger Deficit Problem," published in 1952 by the National Association of Railroad and Utilities Commissioners, page 16.

[10] "Highway Statistics," published by the U. S. Bureau of Public Roads, 1945 edition, p. 60, and 1952 edition, p. 130.

[11] See Brandeis, J., dissenting in Burnet *v.* Coronado Oil & Gas Co. (1932) 285 US 393, 412:

> . . . the decision of the court, if, in essence, merely the determination of a fact, is not entitled, in later controversies between other parties, to that sanction which, under the policy of *stare decisis,* is accorded to the decision of a proposition purely of law. For not only may the decision of the fact have been rendered upon an inadequate presentation of then existing conditions, but the conditions may have changed meanwhile. Compare Abie State Bank *v.* Bryan, 282 US 765, 772. Moreover, the judgment of the court in the earlier decision may have been influenced by prevailing views as to economic or social policy which have since been abandoned. In cases involving constitutional issues of the character discussed, this court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained, so that its judicial authority may, as Mr. Chief Justice Taney said, "depend altogether on the force of the reasoning by which it is supported."

[12] Wisconsin Teleph. Co. *v.* Wisconsin R. Commission, 162 Wis 383, PUR1916D 212, 156 NW 614, 617; Chicago, G. W. R. Co., Trackage, 207 ICC 315, 321; Roy *v.* Illinois Commerce Commission (1926) 322 Ill 452, 153 NE 648.

[13] Southern R. Co. *v.* Commonwealth (1952) 193 Va 291, 68 SE2d 552; Central R. Co. *v.* New Jersey Dept. of Pub. Utilities (1952) 10 NJ 255, 97 PUR NS 308, 90 A2d 1; In Re New Jersey & N. Y. R. Co. (1953) 12 NJ 281, 99 PUR NS 451, 96 A2d 526; Southern P. Co. *v.* California Pub. Utilities Commission (1953) 41 Cal2d 354, 1 PUR3d 438, 260 P2d 70.

Trends in Personal Injury Suits Against Public Utilities

By HARLAN L. HACKBERT*

The problem presented by the impact of personal injury litigation upon public utilities, particularly those in the transportation field, is not a new one. Eighty-five years ago in Illinois C. R. Co. *v.* Welch, 52 Ill 183, 188, the Illinois supreme court said:

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APPENDIX

It has become a matter of public notoriety, and is evidenced by many of the records brought to this court, that juries may generally assess an amount of damages against railway corporations which, in similar cases between individuals, would be considered unjust in the extreme. It is lamentable that the popular prejudice against these corporations should be so powerful as to taint the administration of justice, but we cannot close our eyes to the fact. When this becomes apparent, the courts must interfere. However natural this prejudice, or however well deserved, it cannot be permitted to find expression in unjust verdicts. A railway company is entitled to, and must receive, the same measure of justice that is meted out in a suit between John Doe and Richard Roe.

The court's remarks are most interesting because even as the author of the opinion was struggling to overcome the effects of the prejudice, he nevertheless used the expression "however *natural* this prejudice, or however well deserved." And while none of us here can speak with absolute authority based upon personal experience we know that in that day there was a "natural prejudice" against the public utilities of that period—the railroads, water companies, canal companies, and other of the forerunners of our present-day public utility organizations. The prejudice was a natural one because not only were those early utility companies for the most part owned by outside capital and hence not really representative of local interests, but they were also the largest of the business enterprises of that day; more than that, by virtue of their franchises they enjoyed the special privileges and favors denied to most businesses. The American juror has always been one willing to reduce to a level of equality, if he can, the possessor of such special privilege.

EVEN so, in the earlier days, the common law rules of negligence applied fairly well in personal injury controversies which reached the courts. Those common law rules of negligence had been developed in non-industrial rural communities many, many years before, at a time when most parties litigant, whether they were individuals or business enterprises, stood on a plane of comparative equality. The rules developed at a time when it was an essential element of social philosophy that the individual himself bore a responsibility for making his own way in the world and that included the primary duty of watching out for his own safety as well as for the safety of others. The paternalistic notions that society should care for the individual did not prevail in that nineteenth century day. The doctrine of contributory negligence came into existence as early as 1809.[1] Assumption of risk seems to have arisen as a defense in master and servant cases first in 1837.[2] It has been said that these rules were developed "to give maximum freedom to expanding industry" in that early day.[3] For myself I doubt that there was any such conscious adoption of a capitalistic theory; my own view is that these defenses reflected the thought of that day that it was the man's own responsibility to watch for his own safety and that he could not expect others to do for him what he was not willing to do for himself.[4]

As we read the decisions of the courts of that day we find that reliance was placed on the doctrine of *stare decisis*. Perhaps in those days before annotated statutes, encyclopedias, key-numbered digests, and citators, it was harder work to find a case in point and perhaps the courts in those days gave the victory to the lawyer who was able to find a case in point in principle, if not on all fours on its facts as a reward for his diligence.

As our industrial system developed, in most segments of industry the enactment of workmen's compensation laws took out of negligence litigation the master and servant cases. Ultimately such statutes were adopted in all of the 48 states and in the areas controlled by federal legislation and with the exception of the cases under the Federal Employer's Liability Act, most master and servant litigation was taken away from the courts. I think the practical effect of this was to relieve, for the time being at least, the pressure that otherwise might have existed for a change in some of the basic rules of negligence action. The common law principles of negligence were fairly well adapted for the field of automobile accident cases which arose to take the place of the old master and servant cases as one of the principal active fields of negligence litigation. Thus for a long time into the twentieth century, negligence law

remained rather steady, adapting itself to meet any new conditions but generally consistent with old, well-established doctrines of negligence law developed by the courts through the years.

True, there were developments in the law which eased the path of the plaintiff somewhat. By statute or by judicial decision the burden of proof on the issue of contributory negligence was shifted to the defendant in a great many states. Comparative negligence statutes were adopted in some jurisdictions. The doctrine of "last clear chance" or the "humanitarian doctrine," as it is called in some states, has a very appealing quality and it has had a mushroom-like growth in our system of negligence law. And over the years verdicts tended to grow in size, slowly at first but with increasing momentum as we came out of the depression years into the financially frantic years of World War II.

TODAY, however, we find ourselves in a changed world so far as personal injury litigation is concerned. Without any very clear understanding of how it has come about, those of us who determine the policy to be followed by our companies in personal injury litigation or who are actually handling the cases, find that we are paying out very substantial amounts of money on our clients' behalf in the settlement of claims that would not have been seriously considered a few years ago and we are stunned at the verdicts and the opinions of reviewing courts in cases which ten or fifteen years ago we would confidently have expected would end in a directed verdict if, indeed, plaintiff's counsel had the temerity to go so far as to embark on actual trial.

Verdicts are spiraling upwards so rapidly that in the course of only a few years' time, plaintiffs' attorneys no longer speak of the "adequate award"; it is now the "more adequate award." What we had been taught in law school or learned in our early years of practice were the accepted principles of negligence law, seem no longer to be applicable today. Judicial decisions of even recent vintage appear no longer to be persuasive. If the writer of today's opinion does not brush them away as "not helpful" or as distinguishable on some unimportant factual basis, he may ignore them altogether[5] and even the most emphatic petition for rehearing serves no other purpose than to provide an outlet for the losing lawyer's outraged feelings.

Just what is it that has caused this present-day trend of judicial decisions in the negligence field which falls with such particular weight on public utility defendants?

I THINK the most important single factor which contributed to the present trend of judicial decisions against corporate defendants and particularly, of course, the railroads, was the 1939 amendments to the Federal Employer's Liability Act.[6] As I indicated before this portion of the verdant field of master and servant litigation had been spared the scythe of Workmen's Compensation acts. Even so it had not been a very profitable field of litigation, at least not by today's standards. The narrow definition of interstate commerce under the earlier decisions of the United States Supreme Court[7] rather closely limited the number of those who toiled in that field and the defense of assumption of risk, either under the guise of absence of negligence or in the more accurate use of the term,[8] was a potent defense in the field of railroad operations which came within the scope of the statute. The 1939 amendments had two results of far-reaching importance. In the first place, they broadened the scope of the statute to take in wide areas of railroad operations which had for many years been under workmen's compensation statutes so that there were few, if any, current decisions upon negligence questions arising from operations of that character. In the second place the amendments obliterated "every vestige of the doctrine of assumption of risk" "by whatever name it was called"[9] leaving as the court said "for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury."[10] Thus again a new field of negligence law was opened for decisions on questions of negligence and proximate cause where previously the defense of assumption of risk had made it unnecessary to consider and decide those other issues.

BECAUSE these decisions involved a federal statute and questions of federal law upon which the Supreme Court of the United States had a final say, these FELA cases under the 1939 amendment from all over the country ultimately were channeled into a

single court which approached a field of law in which it was possible to adopt and make effective new principles of negligence law with an attitude of mind, made clear by vigorous dissenting opinions, that a majority of the members of that court intended to make present-day rules of negligence as close an approximation of the workmen's compensation principle of liability without fault in industrially caused accidents as it was possible to do.[11] The language of some judges suggests that the underlying theory of the majority was to compel the railroads to adopt or submit to a workmen's compensation statute on a federal scale for all of their employees making "for all practical purposes, a railroad an insurer of its employees,"[12] but when taxed directly with this accusation the court denied it.[13]

Without attributing such a motive to the court it is, however, easy to see two other factors which underlie the thinking of courts and juries today why railroads and other industries should bear the costs of injuries resulting from their operations without particular regard to old principles of negligence law based upon considerations of fault or carelessness. One of these factors is what one author has referred to as the "contagious principle of workmen's compensation";[14] with workmen's compensation statutes effective as to almost all other employees, certainly all of the employees of large industry, it is hard to persuade a jury no matter how carefully they may be cautioned and qualified on their *voir dire* examination, that a man hurt while at work is not entitled to be paid at least something by his employer.

ANYONE who has questioned juries after the argument of a case which he had vainly hoped and expected to win, knows that juries decide cases that way no matter how carefully they may have been instructed on that precise issue. And generally in other fields of litigation the "insurance principle" is uppermost in our modern-day thinking. Even we lawyers expect our automobile insurance carriers to pay for the other fellow's fender and, if there are personal injuries, to make some reasonable settlement for them, even though we honestly feel that the accident was due to no fault whatever on our own part. Unquestionably this has been a factor in the court's thinking as it molded the doctrines of liability in this newly opened field. The other theory is, of course, the familiar one that the cost of human damage, like the wear and tear of plants and machinery, should be carried by the industry as a part of the cost of doing business and spread over the cost of its products.[15]

However alluring that theory may be and whether it is possible to include the costs of personal injury litigation in the selling price of goods in a competitive industry, we know that in the field of industries under government regulation, like public utilities, it is completely unrealistic to believe that the mounting cost of today's personal injury settlements and judgments will be reflected in increased rates for our companies' services and products before the tomorrow's next and larger wave strikes us. For the past few years only the saving in excess profits taxes has enabled most industries to carry the cost of their personal injury claims and tax savings are not going to be available for that purpose indefinitely.

BUT if these are the reasons which have influenced the trend of present-day personal injury litigation, how have the changes been written into the law? Unless we know how the changing concepts of negligence law have manifested themselves, we cannot expect to correct or even change the trend of the last fifteen years. The Supreme Court insists that it is adhering to the principles of negligence although skeptical dissenters challenge this. What has happened to the basic principles of negligence in the last fifteen years?

A classic definition of a cause of action for negligence is that set forth in Illinois C. R. Co. *v.* Oswald (1930) 338 Ill 270, 273:

> There are three essential elements in actionable negligence: First, a duty imposed by law to exercise care in favor of the person for whose benefit the duty is imposed; second, the failure to perform that duty; and third, a consequent injury so connected with the failure to perform the duty that the failure is the proximate cause of the injury.

If today's defendant is a public utility it is not difficult to find the first element—the existence of the duty to exercise care; in fact, the duty is commonly expressed in rather strong terms. In the railroad employee cases

the duty is to exercise reasonable care to provide a reasonably safe place to work.[16] In the carrier of passenger cases the duty is to exercise the utmost or highest degree of care.[17]

In the electricity cases "all that human care, skill, and vigilance can suggest is the degree of care required"[18] and in the gas cases the company must take "every reasonable precaution suggested by experience and known danger of the escape of gas."[19] In the motor truck and bus cases the familiar principle that "the greater the danger the greater the degree of care required" makes the duty to exercise care mount in proportion to the speed and size of the vehicle just as under the laws of physics its momentum increases and any motorist who travels on today's highways, be he judge or juror, will exact a high degree of care from the truck or bus company. These and other similar expressions by the courts leave little doubt as to the existence of the duty on the part of the defendant.

It is with respect to the second element of actionable negligence that our modern courts seem to me to have become confused and lost their way. They have confused the duty to exercise care with a duty to prevent the accident from happening at all. The duty to exercise reasonable care to provide a reasonably safe place to work has been shortened in judicial decisions and even in approved instructions to a duty "to provide a reasonably safe place to work"[20] and if any employee is injured while at work, obviously the place of work has not been reasonably safe. Commenting editorially upon Wilkerson *v.* McCarthy (1949) 336 US 53, the *American Bar Association Journal* said: "It would seem now, in practical administration of the law, that negligence may be the failure of the interstate carrier to prevent the accident."[21]

And when the duty of the defendant is expressed in terms of the "utmost care short of being an insurer" it is too easy for the court to say that if an accident has happened, "utmost care" has not been exercised. If the test is "all that human care, skill, and vision can suggest" or "every reasonable precaution suggested by experience" then the ingenuity of the plaintiff's lawyer in suggesting some other way that the work might be done or the utility operation performed supplies the needed ingredient of negligence even though the suggested method is not one used in the industry or known to or approved by experts familiar with the problem.[22]

Perhaps as lawyers we have contributed in some measure to the court's departure from the basic rules of negligence. We have argued that the manner in which an accident has occurred does not establish negligence whereas we might have been far better off and on sounder legal ground if we had emphasized the care which had been taken to make the operation safe, in other words, if we had emphasized the defendant's safety or accident prevention program rather than to have dwelt too much on the circumstances of the particular occurrence.

Our courts today have also followed the lead of our federal Supreme Court in confusing the third element of actional negligence. Actually, FELA cases do not involve the doctrine of proximate cause as it is known in common law negligence. The language of the statute imposes liability if the injury is due "in whole or in part" to the negligence of the carrier and this is a very different principle than proximate cause, as some courts have pointed out.[23] But other reviewing courts cite the opinions of the Supreme Court of the United States in FELA cases in their opinions in the FELA cases before them; then having been incorporated into the judicial reports of the particular jurisdiction in this manner, the cases are next cited in ordinary negligence actions and soon the changing concept of proximate cause permeates the entire field of negligence law. By the same process, the changing concept of breach of duty invades state law.

What I have particular reference to is the Supreme Court's abandonment of the long-settled rule that the plaintiff must prove the elements of his case by a preponderance of the evidence. It has long been the rule and the instruction is probably given in almost every personal injury case tried today, that the plaintiff must prove his case by a preponderance of the evidence and if he has not so proved his case or if the evidence is evenly balanced or if the jury is unable to say on which side is the preponderance of the evidence, their verdict must be for the defendant. But in Lavender *v.* Kurn (1946) 327 US 645, and in Tennant *v.* Peoria & Pekin Union

R. Co. (1944) 321 US 29, the Supreme Court held that it is no longer a valid criticism of a jury's verdict that it is based on a choice between inferences equally permissible under the evidence—in other words that the plaintiff failed to prove the inference upon which he relied, by a preponderance of the evidence. Instead says the court: "The very essence of its [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable."[24]

Presumably, the trial judge and certainly the reviewing court under these decisions cannot hold the jury to the duty imposed by the familiar and traditional instruction nor correct what seems clearly a mistaken choice by the jury.

THIS brings me to the last observation of the present trend of personal injury litigation—the changing concept of the relative functions of court and jury. Opinions of our reviewing courts are replete with references to "the historic function of the jury." But these decisions altogether ignore the historic function of the trial judge and the reviewing court.

The constitutional right to a trial by jury is not to a trial by jury alone, but to a trial by a court and jury.[25] The trial judge is not a mere referee passing only on questions of the admissibility of evidence; he has the power and the duty to control the verdict of the jury, to set it aside in its entirety, if there is not sufficient evidence to support it, or to grant a new trial if the verdict is against the preponderance of the evidence.[26] He has the power and the duty to control the amount of the verdict and to set aside excessive verdicts or to require remittiturs as a condition of denying a motion for new trial.[27] These are the historic and constitutional functions of a trial judge, and in a somewhat lesser degree, varying in different jurisdictions, of the judges of our reviewing courts. They are a basic characteristic of our system of jurisprudence and an essential element of the system of justice as administered by our courts. The training and experience of the judge are intended as an offset to the jury's inexperience; his knowledge of legal principles is the counterbalance against the jury's sympathy or prejudice. Many trial judges attempt to discharge this function faithfully. Mr. Justice Frankfurter has aptly stated the alternative:

> The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge.[28]

We do not want timid and lawless judges either in our trial courts or in our reviewing courts. We want judges who will perform their function honestly and competently and without partiality.

MUCH of the recent restrictions upon the power of trial judges and reviewing courts to interfere with a jury's verdict in negligence actions has been predicated upon a notion that it is an unconstitutional deprivation of the right of trial by jury for a trial judge or an appellate court to set aside a jury's determination of fact in a negligence case.

But these cases do not involve any question of constitutional law; the questions presented involve only a determination of questions of negligence law: Has the plaintiff made out a *prima facie* or a sufficient case to go to the jury? If he has, then under the accepted principles of negligence law his case should go to the jury; if he has not, then it is the duty of the court to take the case away from the jury.

And if the issue is to be discussed in terms of constitutional provisions it is important to bear in mind that the Seventh Amendment to our federal Constitution and the corresponding provisions of our state constitutions are not the only provisions which relate to the conduct of litigation. There are the due process clauses which are intended to provide not only that judicial proceedings be conducted in an orderly and proper manner but also that the result of the trial shall be fundamentally a just result; there is the equal protection of the laws clause guaranteeing corporate defendants as fair a trial as an individual plaintiff or an individual defendant. We must emphasize these constitutional principles, as well as the right to trial by jury if we are to change or correct the trend of current judicial decisions, and to protect our clients against unjust or unwarranted verdicts.

WHAT can we do about the trend that has set in so unmistakably in the last decade and a half? I will not repeat here what I have argued for on other occasions but to seemingly little avail: that the railroads of the country must recognize the need for a Federal Workmen's Compensation Act applicable to their interstate employees before the current flood of employee personal injury litigation engulfs the railroads financially and erodes the basic structure of our common law rules of negligence. A clearer recognition of the basic fallacy in much of present-day legal thinking, and a return to fundamental principles may lead to sounder opinions.

Repeated emphasis upon the traditional and constitutional functions of the trial judge and the reviewing courts to correct unjust and unwarranted verdicts may result in a general reawakening of our judicial consciousness.

But unless we stand far enough back from individual opinions to see where they are leading us, or as the old expression goes, see the woods rather than the trees, we will not recognize the way out or the way to correct the erroneous concepts which have crept into negligence law today and which so seriously affect the financial stability of the regulated public utilities.

Footnotes

[1] Butterfield *v.* Forrester, 11 East 60.

[2] Priestly *v.* Fowler, 3 M & W 1; see also Chicago, M. & St. P. R. Co. *v.* Ross (1884) 112 US 377, 386.

[3] Tiller *v.* Atlantic Coast Line R. Co. (1943) 318 US 54, at 59.

[4] Hedgecock *v.* Orlosky (1942) 220 Ind 390, is an interesting example that what is negligence for a defendant is contributory negligence for the plaintiff.

[5] For example, in my own experience (upon which I must largely rely for my examples because time will not permit research for the experience of others) Squibb *v.* Elgin, J. & E. R. Co. 96 Ind App 136, and Ernhart *v.* Elgin, J. & E. R. Co. 399 Ill 512, 337 Ill App 56, 405 Ill 577, involved identical movements at the very same scale, yet on the interstate commerce issue the Illinois courts never referred to the Squibb Case in any one of the three opinions. Instead the Illinois supreme court relied upon an obscure California decision, Lewis *v.* Industrial Accident Commission (1942) 19 Cal2d 284, which was clearly distinguishable on its facts and in fact was never cited anywhere in three sets of briefs.

[6] 45 USCA §§ 51, 54.

[7] Cf. Shanks *v.* Delaware, L. & W. R. Co. (1916) 239 US 556.

[8] See the analysis of Mr. Justice Frankfurter in his concurring opinion in the Tiller Case, 318 US at 68 *et seq.*

[9] Tiller Case, 318 US 54 at 58, 64.

[10] Tiller Case, 318 US 54 at 67.

[11] See Roberts, J., dissenting in Bailey *v.* Central Vermont Railway, Inc. (1943) 319 US 350, at 358; Jackson, J., dissenting in Wilkerson *v.* McCarthy (1949) 336 US 53, at 76; and see Frankfurter, J., concurring in Urie *v.* Thompson (1949) 337 US 163, at 196.

[12] Major, J., in Griswold *v.* Gardner (CCA 7th 1946) 155 F2d 333, 334.

[13] Wilkerson *v.* McCarthy (1949) 336 US 53, at 62, and compare the dissenting opinion of Jackson, J., at page 74.

[14] 9 NACCA L. J. 21.

[15] Roscoe Pound, in 12 NACCA L. J. 205.

[16] Seaboard Air Line R. Co. *v.* Horton (1914) 233 US 492.

[17] 13 CJS 1253.

[18] 29 CJS 576.

[19] 38 CJS 732.

[20] Rouse *v.* New York C. & St. L. R. Co. 349 Ill App 139.

[21] 35 *American Bar Association Journal* 318.

[22] See Stone *v.* New York C. & St. L. R. Co. (1953) 344 US 407; and compare Crowley *v.* Elgin, J. & E. R. Co., 1 Ill App 2d 481, where the evidence showed that the United States Public Health Service, with all its resources of information, was unaware of the hazard of dermatitis in railroad diesel operations.

[23] Coray *v.* Southern P. Co. 355 US 520; Eglsaer *v.* Scandrett (CCA 7th 1945) 151 F2d 562.

[24] 321 US 29, at 35.

[25] Roberts, J., in Bailey *v.* Central Vermont Railway (1943) 319 US 350, at 358.

[26] Herron *v.* Southern P. Co. (1931) 283 US 91, 95; Capital Traction Co. *v.* Hof (1899) 174 US 1, 13, 14.

[27] Wetherbee *v.* Elgin, J. & E. R. Co. (CA 7th 1951) 191 F2d 302, 309.

[28] Wilkerson *v.* McCarthy (1949) 336 US 53, at 65.

APPENDIX

Modern Approach to Rate Case Preparation from a Management Point of View

By R. G. RINCLIFFE*

I AM happy to be with you, and your invitation to participate in this panel discussion on the modern approach to the preparation and trial of a public utility rate case is appreciated. Since I am not a lawyer, I shall not try to talk about the subject from the standpoint of legal procedure. However, I welcome the opportunity to discuss the broad responsibilities of all utility men in the field of sound rate regulation.

First, I would like to stress that, in my opinion, good service and good public relations are the cornerstones on which any successful rate case is based. A company that has earned a reputation for integrity, through years of honest effort to provide good service at a fair price, takes on a character that affects all its dealings, not only in a formal rate case, but in any relations with the public, the regulatory agencies, or the courts. What our friends and neighbors think of us as a public service company has a great bearing on the way in which rate cases are received.

It is my firm conviction that the preparation of a rate case begins with development of the facts, and the presentation of these facts to the public. This should be done long before the case reaches the trial stage. If a rate increase is warranted, the facts should speak for themselves and be made known to the public. Experience has shown that an informed public is usually a reasonable one.

Managerial Responsibility

BROADLY speaking, utility executives have a threefold responsibility—to customers, to employees, and to investors. They must constantly be on the alert to see that all these interests are equitably served. Customers must be given adequate service at reasonable rates; employees are entitled to fair wages and good working conditions; and investors must be assured protection of capital and a fair return on their investment. This should be the objective of good operations and sound regulation, and when this condition has been achieved you have an ideal situation.

Customers are aware of rising costs but often do not realize that our housekeeping problem is basically the same as theirs—an honest effort to maintain a good standard of living. Utility managements should make every effort to absorb higher costs without recourse to rate increases. This has been accomplished by advances in engineering design, promotion of expanding uses of service by new and existing customers, and constant efforts to improve operating performance and methods. These policies have made it possible to meet a steadily rising wage trend for employees. We are convinced that the willingness to pay good wages and to maintain good working conditions is returned by increased labor efficiency and better service to customers.

At the same time, if we are to render the kind of service that is expected of us, we must be able to attract capital on reasonable terms. The only practical way to accomplish this is to give the people who put their savings in public utilities the assurance of a safe investment that will produce a reasonable and steady income. Only then will they continue to invest the large sums needed to provide for the increasing consumer demands.

Departmental Responsibilities

TO make this broad managerial policy effective, it is important that there be a continuing research program, to check and report to management on the adequacy of the rates for the several classes of service. If they are inadequate, management must then decide whether or not to seek a rate adjustment.

Once the decision is made, the chairman of the state public utility commission should be the first person outside the company to be so advised. Then, in line with the modern approach of keeping the public fully informed, the company should assume the responsibility of releasing the facts to the customers, and to the molders of public opinion such as newspaper editors, business heads, civic and political leaders. From that point on, it is the teamwork of the legal, rate, financial, public

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relations, and sales departments, and the entire executive staff to develop and publicize one story—the facts of the situation.

Competitive Status of the Industry

THE utility business operates in a "twilight" zone between public monopoly and competitive enterprise. We are charged with the responsibility of serving all the public on what is generally considered a noncompetitive basis. However, it is well known that regulation performs basically the same functions in the utility field that competition does in other business enterprises.

Furthermore, in many of the applications of our services covering a large portion of revenues, we actually have real competition —just as keen as that experienced by manufacturing companies. In the city of Philadelphia, we serve electricity in competition with gas for many residential appliance and industrial uses. With respect to our large industrial electric customers, we compete with their own generating facilities, and in our suburban territory, where we supply gas, we are continually aware of the competition of coal and oil as fuels for heating. These factors remove us from the "pure" monopoly classification and, even without regulation, would provide a real deterrent to pricing our services out of the market.

Public Relations

As I mentioned earlier, one of the first essentials in the preparation of a rate case is to make the facts known to the public. In our case, most of our 8,400 employees are also customers, and one in three is also a stockholder. We thus have a nucleus of several thousand families who are affected by, and therefore conversant with all three major facets of our responsibility.

Our customer relations staff prepares full information and question-and-answer material for use of our employees, so that they may fully understand the need for the rate increase. For if the public is going to accept the necessity of a rate increase, it must first be understood and accepted by our own employees who are constantly dealing with the public.

These personal contacts by employees, coupled with releases through the news channels and special advertisements, all provide an effective means of creating a sympathetic public understanding—as a forerunner to the formal rate proceedings.

Rate Base and Rate of Return

WE happen to operate in a "fair value" state which gives more recognition to changing economic factors than is accorded under some other methods of rate base determination, such as the depreciated original cost theory. But, even with the "fair value" rule as law, it is important that all groups, customers, investors, and employees, have a clear understanding of the effect of inflation on their own finances in the last decade, so that they can appreciate the problems facing utility companies in meeting inflationary forces.

In determining the proper rate of return, the cost of money (that is, the composite interest and dividend cost of bonds, preferred stocks, and common stocks) establishes a floor, but the allowable return should provide some margin over and above this minimum. This is a proper safeguard to provide for unforeseen contingencies, to encourage and facilitate the maintenance of a conservative capital structure, and to provide some incentive compensation for managerial efficiency. Furthermore, it is of advantage to ratepayers as well as investors that a utility be allowed a rate of return which will permit sound financing.

In the last analysis, a reasonable rate base and fair rate of return are merely tools for obtaining proper recognition of ever-changing economic factors, in an effort to assure equitable treatment to all parties concerned—the public, the employees, and the stockholders. By adhering to a middle ground and not squeezing for the last dollar on the rate base or rate of return, a company can acquire a reputation for reasonableness and fairness which is most helpful in its relations with the public and the regulatory commissions.

Conclusions

IN concluding these remarks, let me emphasize that cases are won or lost in the preparation. We cannot expect commissions to pull our chestnuts out of the fire on poorly

rate changes long before the formal proceedings are begun; first through adhering to standards of reasonableness, and second through a comprehensive program for developing public understanding and acceptance in the ways that I have discussed. Then, when the time comes for the formal proceedings, management and counsel have a joint responsibility to see that adequate, competent, and relevant testimony is developed—consistent with the facts previously disseminated to the public and with the standards and requirements of the commission having jurisdiction.

THESE are the important points, in the viewpoint of at least one utility management, which should be borne in mind in developing effective techniques for the preparation and trial of a rate case.

Mr. Chairman, it has been a pleasure and privilege to have been on the program of your section, and I thank you all for your kind attention.

Modern Approach to Rate Case Preparation from a Regulatory Point of View

By RAY O. MARTIN*

MR. CHAIRMAN, and gentlemen, it is an honor for me to address this meeting. Not being a profound student of the law it was with some trepidation that I accepted your kind invitation to take part in this convention of the American Bar Association. However, in the interest of good utility regulation there are a few points I would like to discuss.

My colleagues on the Ohio commission may or may not agree with me. Furthermore, my comments are based upon cases decided by our commission, by other regulatory bodies, and studies I have been able to make. They are not in any way founded upon cases now pending before our commission.

To understand the importance of the modern-day rate case from the regulatory side of the picture, the past history of the economic facts in the public utility industry leading up to the filing of an application for a rate increase should be briefly reviewed.

Prior to 1945 there were comparatively few rate cases. The utility companies were expanding slowly. Their demands for new capital were rare. The capital needs were small, and could be met out of reserves or surplus. Money market changes because of these conditions had little or no effect upon them.

At the end of World War II an increased demand was placed upon the utility companies by the individual consumers. Just think back a few years and you will realize that the thousands of new homes being built, the increased use of utility services by existing customers, and the industrial and commercial expansion all combined resulted in demands placed upon the supplying companies which were far greater than anticipated. The supply of power was limited. Thousands of telephone subscribers in each state were waiting for service. There was not enough gas to safely permit new space-heating customers to be attached on an unlimited basis.

To satisfy this pent-up demand, each public utility company was required to obtain and spend vast amounts of new capital for improvements. After borrowing all of the money that capital structures would support, selling all the stock that could be sold, and using what surplus could be plowed back into plant, the utility companies of this nation eventually found themselves facing the situation that without additional earnings no more loans could be made, no more stock could be sold, and there was no more surplus to be dedicated to the public use. After the termination of hostilities increasing material prices and labor costs added to operating difficulties. The inevitable conclusion was finally reached that the only answer was increased rates. This was an absolute necessity if the construction program planned at the war's end was to go forward.

In 1948 the flood of cases started and it shows no sign of letting up in any material manner. From that date to the present time every commission has been deluged with service complaints, financing matters, and rate cases.

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To give you an idea of what this activity involved, your attention is invited to the fact that telephone utilities in Ohio increased their total net investment from $325,000,000 in 1944 to $724,000,000 at the end of 1953. This amounts to a net increase of $398,000,000 or 122 per cent above what it was in 1944. In the electric field in our state the 1944 figure was $820,000,000 against $1,739,000,000 for 1953, or an increase of 111 per cent over 1944, which in dollars amounted to $918,000,000. As for our gas companies, the comparable figures are $234,000,000 against $440,000,000, which shows an increase since 1944 of $205,000,000 or an 87 per cent addition.

SOME of the reasons for these unprecedented increases can be readily understood when it is realized that the total number of Ohio telephone stations in 1945 was 1,660,000 against 2,954,000 in 1953. The electric customers increased from 1,647,000 in 1945 to 2,358,000 in 1953. In the gas industry comparable figures are 1,314,000 in 1945 against 1,647,000 in 1953. The gas figures, however, do not reflect the increased usage brought about by already connected customers converting their heating systems to gas heat from some other type of fuel. In this field a better comparison can be made if it is realized that the total gas sold in Ohio was 171,130,000 Mcf in 1944 as against 409,550,000 Mcf in 1953.

In Ohio last year $775,000,000 was spent for capital improvements by the power, telephone, and gas industries. This year those same industries will spend $600,000,000, of which $500,000,000 must be raised from outside sources. It should be noted that much of the difference in these budgets is attributable to the fact that last year the Ohio Valley Electric Corporation, which will supply the energy for Ohio's atomic energy plant now being built, was started. Next year the demand for new capital is the same. Our Ohio companies are tentatively budgeting another $600,000,000, with $500,000,000 to be raised by the sale of bonds or stock to meet the demands of our Ohio consumers. The end still is not in sight.

BEFORE 1948 processing, hearing, and finally deciding an application for a rate increase were done in a more or less lackadaisical manner. Time was not too important. With little or no demands being made by the utility industry for new capital, changes in the money market meant very little to any commission or utility company management. But since 1948 the pace has changed. Now these considerations have become most vital in the rate problem. Through the experience of hard knocks we learned in Ohio that by delaying decisions in rate matters when earnings of the applicant company were low resulted in either increased financing charges or delayed financing awaiting better market conditions. This all was to the detriment of the public service rendered to the people of our state.

Since 1948, rate cases have assumed unprecedented importance. This type of litigation so little resorted to previously now is occurring frequently. It has become a very technical proceeding. Gone is the "hit-and-miss" approach of the previous years. In its place we find a field of law that probably has no equal when it comes to the number of professions and skills that are represented in the trial of rate issues. Reflection will call to your mind the importance of the rôle that you gentlemen as members of the legal profession play in this type of case.

IT should also be noted that without the engineers many of the problems of valuation and service would remain unanswered. The accountants and auditors must add their knowledge to the common pool if an intelligent answer is to be reached. The financial experts and economic advisers must be leaned upon in determining the cost of capital and the advisability of financing. The statisticians and analysts must lend the skills of their calling.

The modern rate case facing any commission today is a complex proceeding and shows signs of becoming more intricate. We should all strive for simplicity if this complexity is to be kept at the minimum.

I urge counsel for both applicant and protestant alike to approach their problems with a view of being as concise and direct as is possible.

It is readily granted that the use of the words "simplicity" and "conciseness" are used in a relative sense, because any rate application in its most simple form involves complex issues. Whether you represent an applicant company or a protestant you should make your respective points brief and clear. From the truck loads of exhibits which go

into many cases I have strongly suspected that many of you gentlemen are charging your fees on the basis of tons of paper delivered. This practice is good for the financial well-being of the paper supply houses and may account for the high cost of paper today.

All the exhibits and the testimony offered in each case should be as clear and understandable as you can make them. I dare say that there have been few exhibits submitted or little testimony given which could not have been improved in this respect if a little more time and thought had been spent upon them. In this regard it seems to me that many times much of the material contained in exhibits should be left in work papers. They could be kept on hand for reference if anyone during the hearing calls for it rather than cluttering up a long record with it in exhibit form.

In order to simplify a rate proceeding I suggest that the applicant wherever possible make enough copies of the exhibits filed with the application so that anyone interested in the matter may have one if he desires. Frequently only enough of these exhibits are made to satisfy the statutory requirements as far as service is concerned. If protestants intervene in such proceeding they are told that no copies are available and they must make a trip to the commission's office to view the exhibits.

I readily agree that as far as the legal requirements are concerned additional copies are not required but much time and effort can be saved by the protestant, the applicant, and the commission if copies are available in the early stage of the case for everyone concerned to study.

There is no hard-and-fast rule which can be suggested on simplification. What could be eliminated in one case perhaps could not be taken out of another. Where one man feels that an exhibit could be simplified another might disagree. I merely want to suggest that regardless of how many theories are advanced, or how many exhibits are submitted, or how many witnesses testify, the commission hearing the case must cut to the heart of the problem and determine how much money the applicant company needs to discharge its duties to the public. Any evidence which does not directly bear upon that question is immaterial and does not help a commission in arriving at a just decision.

The second point to which your attention is invited is that an application for a rate increase should be promptly processed, heard, and decided.

As far as processing by the staff is concerned, every report and all of the previous checks and investigations which are already on hand should be thoroughly used and checked before more valuable time is wasted by repeating over and over again some investigative process. For example, in Ohio practically every public utility company in our state has had two or three rate increases in the past several years. In the earlier cases the inventories and valuations were minutely checked by our engineering staff. The capital expenditures are audited periodically by the accounting staff. In addition, sometimes checks of the entire property have been made in the case of small companies in connection with service complaints. Under such conditions our commission in the past has frequently dispensed with the time-consuming process of completely checking and arriving at a new priced-out inventory and appraisal when new applications were filed. In the past our staff took months and years in some cases to complete its investigation.

With the log jam of cases, the increased demands of the public for service, and the resultant increases in the expenditures to meet those demands, something had to be done to speed up our checking procedures and eliminate some of the regulatory lag. It was apparent that the long delays occasioned by months and months of minutely checking inventories in a rate application could do severe damage to the credit position of an applicant company, which would ultimately reflect in poor service and additional cost to the subscriber. The commission's efficiency had to be increased or the regulatory processes in our state would have broken down. By using all of the records and investigations previously made, applying price indices and trending costs the commission evolved a procedure which it felt was sufficient to test the reasonableness and accuracy of the applicant's figures. As a result, at least up to now, the Ohio commission has been able to process a rate application in a matter of weeks instead of months and years.

The staff of any commission should never be permitted or ordered to investigate merely

for the sake of delaying a final hearing on the issues.

As for preparation, it seems to me that applicant companies and protestants alike do not make full use of the many annual reports, the results of previous investigations, and the supporting work papers which are on file in the offices of most commissions. I suggest to both applicant and protestants that much investigative time may be saved if the accounting and engineering staffs of a commission are consulted on your various problems.

For example, if a protestant city would send one of its engineers or accountants or both to the office of the Ohio commission, I am sure that much of the basic information which they desire to check on a rate application is either already on file before the application is filed, or will be before the secretary's report is sent out. Many tedious hours of preliminary investigation could be saved if this procedure was followed. The records of most all commissions are public records open to anybody's inspection. I am sure that any commission's staff will gladly show and explain all its reports and recommendations.

A commission if it is properly fulfilling its duties should promptly hear and decide a rate application. There should be no procrastination or trying to avoid responsibility. Any application for a continuance made solely for the purpose of delaying the final adjudication should never be knowingly tolerated. However, the commission must be sure that protestants have had sufficient time within which to prepare their defenses. If such time has not been afforded them a reasonable continuance should be granted; otherwise, protestants have not been given the full protection of our laws—they will not have been given a fair hearing.

The reason for requiring a prompt hearing and decision is that if an existing rate is unreasonable and confiscatory then the situation should be promptly remedied by the commission if both federal and state constitutions are to be obeyed. A deliberate delay on the part of a commission or a protestant could amount to confiscation.

Another reason for hearing and promptly deciding a rate increase case is that in fairness to both applicant and protestant the matter should be decided while the evidence is fresh in everybody's mind. If delays occur a great deal of time must be spent in re-examining the record. This is an unnecessary waste of time.

The third and last thing I want to discuss with you is the importance from the commission's point of view of deciding a case based on the evidence in the record and the applicable law.

Let us assume that X company applies for an increase in its rates. Immediately upon the filing of the application before any examination of facts is made there are the usual demagogic statements in the press that applicant is guilty of gouging the public. Then assume that the usual petitions are circulated in which the increased rates are denounced. Further assume that it is time for a municipal or state election which will produce more accusations without investigation of whether the facts alleged are true or not. In other words, assume all the pressure present in most every case. There are motions made to delay the hearing. Then the case comes on for hearing and assume that the applicant clearly proves that the presently charged rates are confiscatory and unreasonable, that it must sell more bonds or stock to complete a construction program which is necessary to meet the increased demands of the public. Also assume that since the last rate increase approved, the applicant has experienced the usual increases in cost of labor and material. Assume further that the protestant's evidence does not in any material way break down the evidence submitted by applicant.

The commission must make its decision. It can travel one of two routes in disposing of this complex matter. The first, and perhaps the easier, is to arrive at the desired result—either denial or approval—and then rationalize its decision. The second approach is for the commission to weigh all of the evidence offered by both applicant and protestant and then based upon the applicable law arrive at the decision regardless of whom it hurts.

Whichever method the commission uses is likely to produce very diversified results. One method could be detrimental—the other good.

Assume that the commission, regardless of the record, is swayed by the demagoguery and the outside pressure and decides to deny the application and then rationalizes its de-

cision. It will momentarily be very popular in some segments of the press. It might be able to command some votes. But what is going to happen to the service which this company renders to the public? The company, if it has sufficient surplus, may be able to weather the storm for a while but eventually after its surplus is exhausted something has to give. It will have to curtail its service. Its construction program will have to be delayed or stopped until such time as its earnings are sufficient to create a demand for its bonds or stocks, or a bank is willing to make a loan.

On the other hand, if the commission adopts the second approach and approves the rates applied for, it will be accused of being proutility. It will be vilified and slandered in some segments of the press. Possibly it will also irritate some voters to the point that they will change their votes in protest. All of these things will be done without realizing that it was necessary in the public interest to grant the increase, because without proper earnings the applicant could not long continue to meet the demands of the public. Or if it did finance its program its cost of money would be higher, which eventually would mean increased rates which the public would have to pay.

A perusal of the public utility regulatory statutes of any state will indicate that the legislature had a threefold purpose as its legislative objective: (1) that the people be furnished with all of the reasonable utility service needed at a just rate; (2) that the utility company supplying such service be permitted to earn a fair rate of return which shall be sufficient to allow it to attract capital on a sound basis in order that it might expand its service to meet the increasing demands of the public; (3) the general welfare and public good of the state in that when the first two objectives are accomplished the possibilities of commercial, industrial, and residential growth within the state boundaries are enhanced. Upon reflection it is obvious, generally speaking, that a state legislature intended in the public interest that its utility regulatory body should constructively regulate the companies which come under its jurisdiction.

This analysis also shows that the various legislatures throughout the country have given to their commissions the power of life or death—financially speaking—over the companies they regulate. This is a fearsome trust when it is realized that the beneficiaries of this responsibility are the public. We must see to it that the consumers do not pay unjust rates and we must also see to it that the supplying company is strong enough to meet the demands of the public for service as cheaply as possible.

Regulatory commissions today are going through trying times. Between increased demands of the public and our inflated economy, a commission that desires to fully perform its duty must make some difficult decisions. It must realize that what it does is not pleasant but is necessary if the constructive program demanded by the legislature of its state is carried out. It must also steel itself to the realization that if it allows itself to be swayed by demagoguery, and does not make its decisions based upon the record and the applicable law, it is ignoring the guideposts set up by its state's legislative body and is not constructively regulating the companies within its jurisdiction. On the contrary, such a commission will destroy the public service in its state. Destruction by regulation was never intended by the legislature.

To sum up, I urge you all to strive always for simplicity and conciseness wherever possible and remember that a modern commission must promptly process, hear, and decide rate applications even though at times it may be a difficult task.

It should also be remembered that a conscientious commission in performing the duties entrusted to it must approach its decisions with clear thinking and never lose sight of the main issue; namely, what is necessary for a company to continue to meet its obligations. In the interest of the public it must have a full realization of its duties and perform those duties with a dedicated sense of responsibility for the public service over which it stands guard. Even though unpleasant at times it must approach its decisions with an unshakable resolution to abide by the evidence in the record and the applicable law.

A Modern Rate Case from the Public Viewpoint

By ROGER ARNEBERGH*

In a utility rate case, counsel for the public is in a most difficult situation. First of all, he seldom has the facilities and staff necessary for the preparation and presentation of an adequate case on behalf of the public. Secondly, the public is not a homogeneous group of people with identical interests. In many cases different segments of the public may have conflicting interests. In the third place, counsel for the public usually is a member of the legal staff of a city; consequently, he may be participating in several rate cases at the same time, each involving different utilities. As a matter of fact, on several occasions two major utility rate cases in which we were participating were being heard simultaneously in adjoining courtrooms, and I had to run from one room to the other for cross-examination or presentation of evidence. Believe me, that is not conducive to the best presentation, nor to a relaxed state of mind.

Before considering these points more fully, it might be well to comment briefly on the reasons for public participation in rate proceedings. This is advisable in view of the oft-repeated sophism that as the commission has its own competent staff to give it the necessary information, and as it must be assumed the commission is going to properly evaluate these facts and reach a fair and equitable decision, it is unnecessary for the public to be represented in rate proceedings.

Of course, this conclusion overlooks the basic philosophy of our entire legal system; that is, that both the proponent and opponent are entitled to be heard, that the defendant, as well as the plaintiff, is entitled to his day in court.

Applying the same pseudo logic to a court case, there would be no reason for a defendant to be represented by counsel or to put on a defense, because it must be assumed the judge is impartial and will render a just decision.

Me thinks a certain interest doth protest too loudly the participation in utility rate cases by counsel for the public.

Sometimes I wonder if those who view with disdain public participation in rate cases do so because they believe such participation to be a waste of time, or because they fear its efficacy in preventing unjustified rate increases. However, it does appear that the more successful such opposition, the more emphatic are those who express the opinion that public participation in rate cases is unnecessary.

As lawyers, all of us here know that it is highly advisable that a party whose interests are being litigated be represented by counsel, and in a rate case the public is the real party in interest. Therefore, it is my firm conviction that counsel for the public has the right, and in many cases the duty, to participate in rate proceedings. In so doing he must advocate a position favorable to his client, the ratepayers; he must present evidence supporting such position; and he must present argument sustaining his contention.

It is axiomatic that a regulatory body such as a public utilities commission can function properly only when it is fully informed of all pertinent facts. The utilities are fully cognizant of this fact. Consequently, in each proceeding before a regulatory commission the utility involved has a large staff of trained experts who adequately present the case on behalf of the utility. When the utility deems it advisable, special experts and consultants of national reputation are engaged in an effort to strengthen the case made by the utility. In the presentation of its case no expense is spared by the utility—possibly because such expenses are generally considered as operating expenses and are therefore paid by the ratepayer.

It is therefore imperative that the public, whose interests are likewise vitally affected, have its side fully presented, and this should be done more frequently than has been the practice.

That public opposition to unjustified rate increases may be quite effective in protecting the public interest is probably best illustrated by a brief reference to some recent cases before the public utilities commission of the state of California in which counsel for the public participated.

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In a series of rate proceedings the California Public Utilities Commission granted a California utility several substantial rate increases, and the commission determined that under the rates thereby authorized the company would earn a rate of return of not less than 5.6 per cent, which the commission found to be fair and reasonable. Then, only nine months after the commission, in granting the company an increase, had reiterated its findings that 5.6 per cent was a fair rate of return for that company, the company filed an application seeking a rate increase of $36,000,000 annually. This increase, if it had been granted, would have raised the rate of return of the company to 7.5 per cent.

At the hearing on the application the company's own evidence showed that under existing rates the company was earning approximately the 5.6 per cent rate of return which the commission had repeatedly held to be fair and reasonable for that company. However, the company urged that it needed the higher rate of return in order to attract new capital, but no substantial evidence was presented showing the need—as distinguished from the desire—for a higher rate of return than that previously allowed.

Fortunately, the public was represented at that hearing. At the conclusion of the company's evidence, counsel for one of the cities represented made a motion to dismiss the case, which motion was joined in by counsel for other cities. This motion was based on the fact that the company's own evidence established that the company was then earning a rate of return which the commission had repeatedly found to be fair and reasonable. The motion to dismiss was granted. A motion for rehearing was made; a rehearing was granted for the limited purpose of introducing evidence of the most recent earnings of the company. The company submitted proposed exhibits, which were objected to as not conforming to the limited purpose of the rehearing. Ultimately the application was dismissed, with no part of the increase therein requested having been granted.

Here was a case where public participation was clearly instrumental in preventing a utility from obtaining a rate increase held to be unjustified. This resulted in savings to the public—the ratepayer—of $3,000,000 per month as compared with the company's request.

In another case of interest a gas utility filed an application with the California Public Utilities Commission seeking a rate increase in excess of $3,000,000, which would have produced a rate of return of 6.35 per cent. During its presentation the company made much if its contention that it had had no rate increases in recent years. While that contention might well be questioned, it was, of course, of no legal significance. The function of the commission was to determine whether or not the utility was earning a fair rate of return, not how many rate increases it may or may not have had in recent years. Certainly, if the company had received rate increases it would not have been of the opinion that merely because of such increases it was estopped from obtaining a further increase regardless of its earning position. Probably the reason the utility put such stress on such an untenable position was that the evidence showed that the utility was then earning a rate of return previously found to be reasonable by the commission.

The actual rate of return being earned was of course in dispute, primarily due to a conflict in the evidence as to what was the proper rate base, and what was a proper price for the utility to pay for gas it purchased from its holding company.

However, evidence presented by one of the interested cities showed that with a return of only 5.5 per cent on its rate base the company would have adequate earnings to pay all operating expenses, interest on debt capital, dividends of 6 per cent on its common stock, and, in addition, would have $1,388,000 for transfer to earned surplus.

The commission, fully considering and properly evaluating all the evidence, denied the application in its entirety, although without prejudice to the company's filing a new application to cover matters occurring subsequent to the hearings.

The company, apparently not completely satisfied with this action of the commission, filed a petition for a writ of review with the supreme court of California. Briefs in opposition to granting the petition were filed by public counsel. The supreme court denied the petition.

Many other cases could be cited where utilities have repeatedly applied for rate increases far exceeding those necessary for the utilities to earn the respective rates of return which the commission had theretofore found to be fair and reasonable for such utilities. This, of course, made it incumbent on counsel for the public to diligently cross-examine company witnesses, and to produce evidence in opposition to such portion of the requested increases as would result in rates of return in excess of those theretofore determined to be fair and reasonable, no change in circumstances having occurred which would justify higher rates of return.

THIS policy of some utilities, forcing such action by counsel for the public, necessarily results in greatly protracting rate proceedings, overburdening the commission, and delaying even justified rate relief. But the responsibility for this lies with the utilities —not with the commission, nor with counsel for the public. Counsel for the public must vigorously oppose any unjustified rate increase.

Conversely, if a utility applies for a rate increase which is clearly justified, then public counsel should have the courage to concede that the requested increase is proper, and not oppose the increase merely because to do so might appear to be politically expedient. Both the utility and the public are hurt if a rate proceeding is unnecessarily protracted, especially in a case where the utility is entitled to receive all that is requested. Furthermore, it is unfair to the commission before whom the case is pending for counsel for the public to seek headlines by opposing an increase he knows is required. He may make himself a hero with some elements but thereby he makes the commission's task much more difficult. Its duty is to grant such an increase, at best an unpopular action, and when it is improperly opposed by public counsel the commission's action becomes even more unpopular and misunderstood. Instead, in such cases counsel for the public should endeavor to expedite the proceedings so that necessary rate relief can be obtained without unreasonable delay.

IN connection with expediting cases, it might be interesting to mention a rather anomalous condition that prevailed in many rate cases in which I have participated. The utility, in its opening statement, at various times throughout the hearing, and in its closing argument, repeatedly emphasized its dire financial position and the urgent necessity for rate relief and urged the commission to expedite the proceedings and its decision in every way possible. Yet, during the hearing the company would come in with hundreds and hundreds of pages of typed questions and typed answers, and then we would go through the rather ridiculous situation of having high-priced counsel reading verbatim these prepared questions and high officials or nationally renowned experts reading these carefully prepared answers, this procedure lasting several days.

However, when an offer was made to stipulate that this prepared testimony might be included in the record by reference so as to shorten the proceedings and save the time of all parties participating, the utilities would decline to accept the proffered stipulation. Apparently, it was felt that the forensic eloquence of these witnesses was more important than the saving of time. This is a practice which at least one public counsel firmly believes could well be discontinued.

ANOTHER matter in which it is felt that rate cases could be shortened would be for utilities to eliminate unnecessary witnesses, witnesses apparently called solely because their high position with the utility or their prominence in the community may rate a newspaper story.

Likewise, it would appear that a substantial amount of expense could be saved by utilities refraining from filling the courtroom with numerous vice presidents and other "top brass" whose only function seems to be to impress the commission or add prestige to the hearing. It is not good taste to use stuffed shirts for window dressing. Actually, such practice, in my opinion, merely lends credence to the frequently expressed view that many utilities are overstaffed with executives. This is an unfortunate impression to create, because I know of no case in which this is true in fact. But at the same time no city could afford, either financially or operationally, to have a dozen or more of its top officials sit in a hearing week after week, merely for the purpose of expressing physiognomically their approval of everything said by

their counsel and his witnesses and their disapproval of everything said in opposition.

REFERRING again to that rather nebulous thing, the public interest, it must be recognized that the public has many different and conflicting interests. For example, the interests of the farmers, who constitute a large segment of the public, are different from those members of the public who reside in large cities.

Likewise, in many instances the interests of members of the public who reside in small cities are different from the interests of either the farmer or the residents in large cities. Then, too, interests of different classes of users of a utility service are conflicting. For example, a large industrial user of gas has a different interest from that of the housewife who uses gas for cooking and heating. Even among housewives there are those who use gas only for space heating, using electricity for cooking. The housewife who uses gas throughout the year certainly believes that she is entitled to a lower unit rate than that paid by the person who uses gas only for heating, which requires the utility to provide extra facilities used only occasionally and at a time of peak demand.

Therefore, the regulatory body should be fully advised of the interests of these different segments or groups of the public in order that it may properly evaluate these varied and frequently conflicting interests. This presents the question as to the position which should be taken by counsel for the public. This of course involves a consideration of what interests will be specially represented, and what evidence will be presented to the commission other than by counsel for the public.

GENERALLY, the commission staff presents a comprehensive study setting forth the history of operations and the current operating results of the utility involved. However, this presentation is made from a purely objective standpoint. Because of the fact that the commission represents the entire state, and at different times acts in a quasi-judicial, Legislative, or Administrative capacity, neither the commission nor its staff is in a position to advocate for any special interest, or to prepare evidence specifically on behalf of any of these conflicting interests of different portions of the public.

In addition, organized groups such as manufacturers and farmers are adequately represented by competent counsel and trained experts when their special interests are involved. But in most cases the ordinary ratepayer is not represented, and undoubtedly cannot afford to be represented unless his interests are protected by counsel for the public.

Yet, usually this group is the most numerous and collectively pays the largest bill.

It is therefore frequently the duty of counsel for the public to emphasize the case of the ordinary ratepayer. Only in this manner can the interests of the small users be fully protected. Of course, in so doing, he must also consider the over-all problems involved, and he cannot favor the small user to an extent which would be inequitable for economically unsustainable.

IN addition to particular problems of special classes of users, general questions are also involved which require presentation of the views of the public as well as those of the utility. While it may be true that the staff of the regulatory body will present sufficient evidence to clearly show the revenue effect of rates at various levels, nevertheless this leaves unanswered the two fundamental questions present in every rate case:

> First, what is a proper *rate of return;* that is, how many dollars should the utility be permitted to earn?
>
> Second, the *spread of rates;* that is, where should the money come from?

In connection with this second point, the question arises as to whether all rates should be increased equally, or should some rates receive a larger increase than others; should rates to the large industrial users be increased in the same manner as rates to the small home owners? Should rates be on a uniform statewide basis, or should consideration be given to results of operation in various areas within the state? Should cost of service, or value of service, be separately considered for different types or classifications of users, and, if so, to what extent? In order that the regulatory body can properly determine these questions, it is essential that proper evidence be presented by representatives of the particular groups most vitally affected.

As an example of this I might refer to telephone rates. In California, as elsewhere, the Bell system has sought to have rates fixed on a uniform statewide basis, the rate charged being dependent upon so-called station availability; that is, the number of telephones which a subscriber may call without any additional charge being added to his basic monthly rate. Under that procedure, no consideration is given to results of operation in the various service areas of the company. Statewide results of operations are all that are considered.

Now this is, in my opinion, most unfair. It generally results in large cities paying far more than the cost of the service they receive, and small isolated areas paying far less than the cost of rendering the service. Under this theory, the individual telephone subscriber in a large city, where there frequently are literally thousands of telephone stations in a single building, pays a higher rate than does the subscriber in a small community where the telephone stations may be hundreds of yards apart. Now you and I both know that where a company must maintain miles of telephone lines for a few subscribers, it costs more per subscriber than where there are many stations or subscribers within a similar area. To require the subscribers in a large city to pay an excessive rate in order to subsidize the isolated subscriber who receives service at an inadequate rate, is a form of socialism, regardless of whether or not we like the term.

Of course, the whole theory of "station availability" is utterly absurd, as, technically, every telephone subscriber anywhere in the world is "available" to every other telephone subscriber.

Fortunately, our California commission has recognized the fallacy of this theory, largely due, in our opinion, to the position taken by counsel for the public in the Los Angeles area.

One further point should be strongly emphasized. It is not enough that the public representative appear in a case and make a speech to the effect that he does not want rates to be increased for his constituents. Such a speech may be very popular, it may meet with much public approval, and may even call attention to the existence of conflicting interests, but it is no solution.

If the rate increase requested is improper or even excessive, this must be shown by the proper presentation of pertinent facts. Evidence must be developed and presented to show why the request by the utility is unwarranted or excessive, and to show how much money the utility actually needs and where that money should come from so as not to work unnecessary hardship or an injustice on any class of customers or on any individual.

It is folly for a public representative to publicly protest against a rate increase when he knows, or should know, that it is justified and is necessary in order that the utility may properly serve the community. While it is the duty of counsel for the public to obtain the best possible utility service at the lowest rates commensurate with good service, he must recognize that no utility can long render good service at inadequate rates. It is not in the public interest to attempt to obtain public utility service at rates which will not enable an efficiently operated utility to earn a reasonable return on its investment necessarily dedicated to serving the public.

While it may be true that on some occasions various "organizations," and even some newspapers, will excoriate or criticize the refusal of public counsel to oppose justified rate increases, or his action in conceding in a proper case that a portion of the rate increase requested is required, nevertheless, in order for a public representative to be of any assistance to the commission or of lasting value to the public, he must take a position which is legally sustainable and economically sound. Only in this manner can he retain his integrity; only by so doing can he command the respect of the informed members of the community and enjoy the confidence of the commission; only in this manner can he be a truly effective counsel for the public.

Because of the extemporaneous nature of his address, the actual text of the discussion by Whitney R. Harris, professor of administrative law of Southern Methodist University, was not available for publication. He represented the Hoover Commission Task Force.

APPENDIX

Impact of the Work of the Hoover Commission on the Interstate Commerce Commission

By DAVID I. MACKIE*

RAILROADS came under federal regulation with the passage of the act to regulate commerce on February 4, 1887.[1] There was considerable discussion of the type of regulatory body which should be used for enforcement of the law. A national railroad commission was considered as was enforcement by the courts. It was finally determined to use the commission form.

Originally, the commission was made responsible in some degree to the Department of the Interior. In 1889, the statute was amended to require that the commission report directly to Congress.[2] It has continued since then to be responsible to the Congress.

The commission came into being to regulate the railroads. By virtue of numerous subsequent amendments of the statute, its jurisdiction has been extended over highway carriers, domestic water carriers, freight forwarders, sleeping car, express, and oil pipeline companies. Its regulatory powers over the railroads are broad—encompassing rates, fares, and charges, joint rates and divisions, through routes (with certain exceptions), the prevention of preferences, discrimination, or the granting of rebates. The commission likewise has jurisdiction over the provision of car service, joint use of terminals, construction of new rail lines, extension and abandonment of existing lines, issuance of securities, mergers and consolidations, acquisitions of control, reorganization of companies in financial difficulties, adjustment of securities, accounting, and safety.

SIMILAR powers are exercised over the other carriers under its jurisdiction, though they are not in many instances as broad.

The commission is composed of eleven members of whom not more than six may be of the same party. Members serve for terms of seven years and until a successor is appointed. They may be removed only for inefficiency, neglect of duty, or malfeasance in office. The chairman is elected annually by the members, each member serving for one year in rotation.

The commission operates largely by divisions. Its eleven members are divided into five divisions, each ordinarily composed of three members, for decision of most classes of cases coming before it. Each division deals with certain types of cases. Only general investigations begun on the commission's own motion are ordinarily decided by the full commission in the first instance, and in such cases the full commission seldom hears testimony, though it may hear oral argument. Under the shortened procedure many cases are assigned to individual commissioners for handling where the parties consent. The great bulk of the hearing work, research, and initial report writing is done by examiners. Divisions will seldom hear testimony except when a case is reopened, but will commonly hear argument.

Numerous disputes are handled informally under a variety of procedures.

The commission was in 1940 directed to administer and enforce the Interstate Commerce Act with a view to carrying out the declaration of National Transportation Policy.[3] That declaration of policy calls for "fair and impartial regulation of all modes of transporation" subject to the act, "so administered as to recognize and preserve the inherent advantages of each"; to "foster sound economic conditions in transportation" —"all to the end of developing, co-ordinating, and preserving" an adequate transportation system.

THE commission may properly be described as an independent regulatory agency responsible to the Congress, performing quasi-legislative and quasi-judicial functions, as well as various incidental administrative duties. In the prescription of future rates, the commission is acting in the quasi-legislative field. In the awarding of reparations because of the collection of an illegal rate, for instance, the commission is acting in the quasi-judicial field.

As a general rule, the Interstate Commerce Act requires a public hearing before entry

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of an order. Hence most of the commission's procedure is quasi-judicial irrespective of the nature of the particular function involved in any particular case.[4] This requirement of notice and hearing "implies both the privilege of introducing evidence and the duty of deciding in accordance with it." [5]

The Supreme Court has said that the commission's powers "are expected to be exercised in the coldest neutrality," [6] that it has come to be regarded as a body of experts "appointed by law and informed by experience." [7]

The oldest of the independent regulatory commissions, the ICC has "set the pattern for much of the subsequent development of other similar bodies. Its reputation for impartiality, independence, and expertness in its decisions, and for full procedural safeguards for interested parties have undoubtedly contributed to the standing of the independent commission." [8]

The independence of the commission from political control has contributed greatly to its stature. The Task Force on Regulatory Commissions of the first Hoover Commission recognized this, saying:

> Most carriers, shippers, and students of transporation appear to agree that the independent status of the commission should be maintained. That independence is quite real and has a definite and important effect upon the development of transportation policy. Major rate controversies have severe political repercussions; sectional and group interests are deeply involved in such proceedings. In the hands of either the legislature or the executive, their solution would tend to become trials of political strength.[9]

PRESIDENT Wilson is said to have stated that he would as soon think of proffering suggestions to the Supreme Court upon a matter before it as to suggest how the commission should decide a case.[10]

More recently, some attempts have, however, been made to bring political influence to bear.[11] We shall presently examine a more recent case.

The authoritative weight of opinion of students of transportation is that independence from political pressures is fundamental to the continued strength of the commission. Sharfman said: "Interference by the executive branch of the government (with the commission) is an unmixed evil, however subtle and indirect its manifestations may be."[12]

The Federal Co-ordinator of Transportation, the late Joseph B. Eastman, said:

> Public regulation of transportation, in view of the public character of the industry and the many vitally interested parties who have a right to be heard, must be administered by a permanent, independent, and nonpolitical body having a continuing and dependable policy, and through definite statutory provisions which register the will of Congress. This body must not be subject to sudden political reorganizations; it must act in controverted matters on a record openly and publicly made, and state the reasons for its action; and, apart from statutory directions, it must be as removed from influence by the President, Congress, or any political agency as the Supreme Court itself.[13]

CONGRESS experimented in 1933 with placing an independent regulatory commission in an executive department. The United States Shipping Board, a previously independent regulatory agency, was transferred to the Department of Commerce as the Shipping Board Bureau. This experiment failed, and in 1936 Congress transferred the same functions to a new independent regulatory body, the Maritime Commission. The experiment has been tried again. By virtue of another transfer (under Reorganization Plan No. 21 of 1950) the functions of the Maritime Commission are now performed by the Federal Maritime Board, another agency within the Department of Commerce.

An attempt on the part of the President to encroach upon the independence of a regulatory agency occurred in the early thirties. The action was reviewed by the Supreme Court in Humphrey's Executor *v.* United States (1935) 295 US 602.

President Roosevelt had attempted to remove Commissioner Humphrey of the Federal Trade Commission for the reasons as stated by the President that: "I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission,"

and "that the aims and purposes of the administration with respect to the work of the commission can be carried out most effectively with personnel of my own selection."

This case posed the question of whether a member of an independent regulatory commission, duly appointed for a term fixed by Congress, in fact holds office at the pleasure of the President, subject to removal by the President solely because of failure to carry out presidential policies. This question raised the underlying question of whether or not such a commission is a part of the executive branch of the government, or is independent of it.

THE court unanimously ruled against the President on both points. It held that he was without the asserted power of removal and that the Federal Trade Commission, like the Interstate Commerce Commission, is not a part of the executive branch of the government.[14]

Thus, the Humphrey Case prevented the independent regulatory commissions from being treated as within the executive department or under the direct administrative control of the President. The independence of their quasi-legislative and quasi-judicial functions was thus preserved.

A more indirect attempt at executive invasion of the independence of the Interstate Commerce Commission was involved in Reorganization Plan No. 7 of 1950.[15] That plan, among other things, provided for the transfer of power of selection of the chairman of the Interstate Commerce Commission from the members of that commission to the President. Additionally, it centralized control of the administrative affairs of the commission in the office of the chairman.

THE first of these proposals—presidential power of appointment of the chairman—had been advocated by the Task Force on Regulatory Commissions of the first Hoover Commission.[16] However, the first Hoover Commission deliberately avoided comment on this recommendation of its task force, thereby disclaiming it.

The second proposal — the centralization of administrative responsibility in the office of the chairman—was likewise advocated by the task force[17]— as well as by the first Hoover Commission itself.[18]

After careful study, the railroad industry concluded that Reorganization Plan No. 7 of 1950 should be opposed. It, accordingly, appeared before the House Committee on Expenditures in the Executive Departments in support of H Res 545—a resolution of disapproval of the plan. That resolution carried and the plan, accordingly, never went into effect.

It would appear that through the subsequent appointment of a managing director desirable objectives of the first Hoover Commission in its recommendation for the centralization in the office of the chairman of administrative responsibility have been largely accomplished.

Fortunately, the commission remains free of the potential political influence which presidential power of appointment of the chairman would indubitably have brought about. The first Hoover Commission was indeed wise in its refusal to adopt that proposal.

REORGANIZATION Plan No. 21 of 1950 concentrated in the Department of Commerce promotional and administrative agencies dealing with transportation—and some regulatory agencies as well. Under that plan, the United States Maritime Commission was abolished and its functions were transferred to two new agencies both within the Department of Commerce, the Maritime Administration and the Federal Maritime Board. Generally speaking, the administrative and promotional activities were placed in the Maritime Administration while the regulatory functions were vested in the new board.[19]

President Truman, in commenting on the policy behind Reorganization Plan No. 21 of 1950, stated that it "will mark a long step forward in the integration of the many government programs affecting transportation." He said that the department for more than a decade "has been in the process of becoming the major transportation agency of the government. . . . Now, with the addition of the functions of the Maritime Commission, the department will have jurisdiction over the major portion of the operating aspects of the programs of the government relating to air, highway, and water transportation, as well as over the development and co-ordination of policies affecting the nation's transportation system as a whole."[20]

In order to carry out this program more effectively and to handle the increased powers of the department, Reorganization Plan No. 21 of 1950 called for the appointment of an Under Secretary of Commerce for Transportation.

IT must be agreed that this program, following certain of the recommendations of the first Hoover Commission for concentration of all general research, administrative, and promotional activities under centralized direction and control in an executive agency, coupled with retention of separate commissions to perform essentially regulatory functions, represents considerable progress in the process of integration of the various federal agencies dealing with transportation. However, there are significant departures from this integration, among which note must be taken of the abolition of the Maritime Commission and the transfer of all of its functions, administrative, regulatory, and promotional, to the Department of Commerce.

What has been said above would seem to demonstrate the questionable wisdom of placing the regulatory functions of the Federal Maritime Board in the Department of Commerce.

It is important that within our time limitation we look at the impact of the Hoover Commission on the breadth of jurisdiction of the Interstate Commerce Commission.

Transportation regulation is today shared by three independent federal agencies—the Civil Aeronautics Board, the Federal Maritime Board, and the Interstate Commerce Commission. For the purposes of our major concern the field of regulation of the Federal Maritime Board is relatively remote.

EACH acts within its sphere of responsibility without regard to the effect of its acts on the other media of transportation. Herein lies the core of a basic transportation problem. Herein also lies one of the principal underlying bases of our failure to carry out the declaration of national transportation policy to which we have above made reference. The task of realizing the objectives of that declaration of national policy is clearly impossible of accomplishment except through an organization with responsibility as broad as the problem with which it is to deal. It is only through a single regulatory body that there can be any hope of providing "for fair and impartial regulation of all modes of transportation" or of accomplishing the declared end "of developing, co-ordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense."

Most of the alleged advantages of a separate regulatory body for each mode of transportation are disclosed to be in fact distinct disadvantages when considered in the light of the declared purposes to which all carrier regulations is to be directed. It is said, for instance, that a regulatory body dealing with a single agency of transportation would have a better opportunity to familiarize itself with the conditions under which that particular agency operates and with the problems peculiar to it than would a commission or body dealing with all agencies. But if regulation is to be effective for the purposes intended, each such agency must be dealt with in the light of the entire transportation picture and policy and not merely on the basis of its own peculiar situation.

Again, it is said that a commission or body dealing with only a single type of transportation could be expected to be more sympathetic toward the carriers which it regulates than would a commission or body dealing with all types of transportation, and, as a corollary, would be better fitted and more inclined to engage in promotional activities in behalf of the carriers under its jurisdiction. Nothing could be more contrary to our declared policy with respect to transportation than to have separate regulatory bodies vying with each other in their efforts to promote the respective types of transportation under their jurisdiction, with the inequalities, preferences, and favoritisms that would inevitably result.

FINALLY, it is said that separate regulation of the different types of carriers would insure competition between them. It must be borne in mind, however, that competition between the different types of transportation will best serve the public interest if such competition is fair and equal. To attain such equality, regulation of the several forms must also be fair and equal. Such regulation can be attained only through a single regulatory agency. Thus consideration of the problem

of competition lends no support to the view that there should be different regulatory authorities but, on the contrary, affords strong support for a single regulatory body.

With one outstanding exception (disregarding for the time being the Federal Maritime Board) Congress has followed a consistent and logical program in dealing with the machinery of transportation regulation. It has entrusted to a single governmental body the regulation of railroads, express companies, sleeping car companies, pipelines, motor carriers, domestic water carriers, and freight forwarders. The important departure from that program, the creation of a separate agency for the regulation of air carriers, was taken prior to the adoption of the declaration of national transportation policy now contained in the Interstate Commerce Act. In furtherance of that policy, that departure should be remedied by extending the jurisdiction of the Interstate Commerce Commission to include the regulation of air transportation.

There is distinguished authoritative support for the foregoing views. Twenty years ago the Federal Co-ordinator of Transportation, Joseph B. Eastman, recommended a single independent regulatory agency—the Interstate Commerce Commission—to have regulatory jurisdiction over all important forms of transportation.[21]

THE committee of six in 1938 recommended uniform regulation, similar in character and scope, for all modes of transportation.[22]

The Honorable Charles Sawyer, former Secretary of Commerce, in a carefully prepared report to the President, concluded that "a consolidation of regulatory controls will eventually be necessary."[23]

The creation of a National Transport Regulatory Commission to administer a revised program of public regulation applicable to all forms of transportation was advocated by those two outstanding authorities, Charles L. Dearing and Wilfred Owen.[24]

Recently the Temple University in its "Survey of Federal Reorganization" (1953) recommended for action after study the creation of one independent regulatory body for transportation.[25]

The first Hoover Commission Task Force on Transportation recommended the creation of a National Transport Regulatory Commission to administer a revised program of public regulation applicable to all forms of transportation, absorbing the regulatory functions of the Interstate Commerce Commission, the Maritime Commission, and the Civil Aeronautics Board.[26]

THE Task Force on Regulatory Commissions made the contrary recommendation that separate regulatory agencies be retained.[27] Its conclusions were adopted by the first Hoover Commission.[28] Commissioners Brown and Pollack dissented, advocating in a separate statement appended to the report a single Transportation Regulatory Commission.[29]

The Hoover Commission laid emphasis on the view that the three commissions it recommended be continued are overburdened; that the statutory approach to those three fields of transportation has been different; and that entirely different techniques are needed for the solution of the problems in the various fields. It admitted awareness of "some lack of co-ordination of national transportation policy" as a result of separate continuance of the three commissions.

Commissioners Brown and Pollack in their dissent asserted that the positive advantages of combining the regulatory functions outweigh any theoretical disadvantages.

The majority of the first Hoover Commission appears to have taken an illogical and inconsistent position on this point. The rarely defensible expediency of a double standard has been applied. On the one hand it advocated the concentration of administrative and promotional functions in one place. Yet it advocates leaving the regulatory functions divided among three commissions.

Thus the majority recommends that the promotional or administrative aspects of highway, waterway, airline, and railroad transportation be transferred to the Department of Commerce, differences in statutory approach, in techniques, functions, and stages of maturity to the contrary notwithstanding. Yet the majority sees no sufficient reason for the integration of the regulatory functions relating to the same types of transportation.

THIS approach to the problem reaches an illogical extreme in the recommendation of the majority of the Hoover Commission

against combining the Civil Aeronautics Board with the Interstate Commerce Commission. The major function of the board is the regulation of domestic air carriers who are in daily competition in every part of the United States with carriers under the regulation of the Interstate Commerce Commission, the railroads, bus lines, sleeping car, express, and freight forwarder companies—as well as domestic water carriers.

The need for consolidation of the regulatory functions of the Civil Aeronautics Board with those of the Interstate Commerce Commission is pressing. It is submitted that the Task Force on Transportation took the proper view of the issue.

A second Hoover Commission has been appointed and is functioning, again under the chairmanship of the distinguished former President. While certain subcommittees within the organization of the new commission are understood to be giving consideration to limited questions involving the transportation industry, it is understood that the commission does not expect to study the whole national question of transportation. This is indeed unfortunate in view of the commission's peculiar qualifications to do further work in this important field. Much remains to be done. Many basic problems remain unsolved. Their further consideration by this commission would surely be helpful.

Footnotes

[1] 24 Stat 379.

[2] Act of March 2, 1889, 25 Stat 855.

[3] National Transportation Policy (September 18, 1940) 54 Stat 899.

[4] Annual Report of the Interstate Commerce Commission, 1947, pp. 14-19.

[5] Chicago Junction Case (1924) 264 US 258, 265.

[6] Interstate Commerce Commission *v.* Chicago R. I. & P. R. Co. (1910) 218 US 88, 102.

[7] Illinois C. R. Co. *v.* Interstate Commerce Commission (1907), 206 US 441, 454; Standard Oil Co. *v.* United States (1931) 283 US 235, 238.

[8] Hoover Commission Task Force Report on Regulatory Commissions, 1949, p. 82.

[9] *Idem,* p. 83.

At page 20 of the report the Task Force, in speaking of the necessity for freedom from influence of regulatory agencies, said:

"If the agency is subject to partisan or political influence or control, this will not only defeat the public purposes of regulation and unfairly benefit the influential, but will also tend to impair public confidence in the democratic process and the effectiveness of governmental action generally. Thus, in the interest of fairness to the individuals concerned, of the attainment of the public objectives, and of the maintenance of the integrity of government, there is a vital necessity for assuring that such regulatory agencies are insulated from partisan influence or control to the maximum extent feasible."

[10] D. Philip Locklin, *Economics of Transportation,* 3rd edition, 1947, p. 299.

[11] In 1928, B. H. Meyer, then a member of the ICC, in an address entitled "In the Public Interest" before the University of Wisconsin Chapter of Phi Beta Kappa stated:

"The commission has always been an independent body. It has nothing to do with politics, and no political influence has ever determined its official action on any question. I must admit, however, that occasionally attempts have been made to nibble politically at the commission. In the past these nibbles were sometimes annoying but never harmful. It has remained for recent time to attempt to control commission action through political channels. These attempts were made boldly and at times with fury. Every one of them has failed. I do not believe they ever will succeed but it will be a sorry day for government if they ever should succeed."

[12] Sharfman, *The Interstate Commerce Commission,* Volume II, p. 488.

[13] Report of the Federal Co-ordinator of Transportation 1934, 74th Congress, 1st Session, House Document No. 89, p. 15.

In an address entitled "Credo" delivered in 1944 and printed in the *American Bar Association Journal* of May, 1944, at page 266, the co-ordinator said:

"With the country as big and complex as it is, administrative tribunals like the Interstate Commerce Commission are necessities. Probably we shall have more rather than less. To be successful they must be masters of their own souls, and known to be such. It is the duty of the President to determine their personnel through the power of appointment, and it is the duty of Congress to determine by statute the policies which they are to administer; but in the administration of those policies these tribunals must not be under the domination or influence of either the President or Congress or of anything else than their own independent judgment of the facts and the law. They must be in a position and ready to give free and untrammeled advice to both the President and Congress at any time upon request. Political domination will ruin such a tribunal. I have seen this happen many times, particularly in the states."

[14] In its opinion in the Humphrey Case the Supreme Court said:

At page 625

"Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive

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authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office."

At page 628

"The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. . . . To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial department of the government."

At page 629

"We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control, cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."

At page 630

"The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments."

[15] Transmitted to the Congress by the President on March 13, 1950.

[16] Op. cit. *supra*, note 8, p. 86.

[17] *Idem.*

[18] Regulatory Commissions, a Report to the Congress, March, 1949, the Commission on Organization of the Executive Branch of the Government, Recommendation No. 1, p. 5.

[19] Message of March 13, 1950, from the President to Congress, regarding Reorganization Plan No. 21 of 1950, 81st Congress, 2nd Session, House Document No. 526, p. 3.

[20] Message of President Truman to Congress, March 13, 1950, House Document No. 503, 81st Congress, 2nd Session, p. 5.

[21] Op. cit. *supra*, note 13, pp. 43, 56.

[22] Report of committee appointed September 20, 1938, by the President of the United States to submit recommendations upon the general transportation situation, December 23, 1938, p. 13.

[23] Issues involved in a Unified and Co-ordinated Federal Program for Transportation, a report to the President from the Secretary of Commerce, December 1, 1949, p. 42.

[24] National Transportation Policy, The Brookings Institution, 1949, p. 407.

[25] Volume 2, Recommendation 4, p. 56.

[26] This is the same recommendation as that referred to in note 24, *supra*. The Brookings Institution served as the Task Force on Transportation to the first Hoover Commission.

[27] Op. cit. *supra*, note 8, p. 91.

[28] Op. cit. *supra*, note 18, p. 14.

[29] *Idem*, p. 19.

The Hoover Commission and the Independence of Federal Regulatory Agencies

By BRADFORD ROSS*

As a member of this section's program committee, I have made two mistakes—first, in permitting myself to be assigned as the last of three speakers on the same subject, and, second, in permitting myself to be assigned to speak at all. With the latter, you may agree as your patience wanes.

It is, of course, impossible to forecast authoritatively the topic assigned for this discussion, "Impact of the Work of the Hoover Commission on the Independence of Federal Regulatory Agencies." That is because the commission's task groups are just now under way in their investigations of the numerous government organizations and activities. Necessarily, therefore, I shall discuss the possible impact of the commission's work on independent regulatory agencies.

At the outset, let us agree upon what is meant by typical "independent regulatory

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agencies." As we all know, Congress was the branch of government given control under the Constitution over interstate commerce. With the development of certain industries engaging in interstate commerce, it became obvious that Congress could not devote the time required for the daily regulation of their activities in the public interest. This was true particularly of public utility industries, those "affected with a public interest." Necessity compelled assignment of the task of day-to-day regulation to other agencies.

THE independent regulatory commission was determined upon as the solution. The first such agency was the Interstate Commerce Commission, established in 1887.[1] As other interstate industries developed, Congress established additional independent commissions as it found regulation necessary, modeled generally after the Interstate Commerce Commission. These commissions were conceived and organized as arms of the legislative branch, independent of the executive. Their compositions are bipartisan. The terms of their members are staggered in order to provide continuity of experience and expertise. To protect the membership from change because of party affiliation, members are removable only for cause. The agencies' work is sometimes quasi-legislative and sometimes quasi-judicial. In addition, they have related administrative responsibilities. Indeed, they are functional hybrids. But such large segments of their duties are legislative or judicial in character that all of the traditional arguments supporting the constitutional separation of powers argue forcefully against subjecting these agencies to executive control.

Those of us familiar with or practicing before these agencies appreciate fully the necessity of maintaining their independence, particularly from political pressures. We sometimes disagree with their decisions, to be sure. And at times we "sweat out" what seems ages, for a decision to be handed down. But when it does come down, we want to know that it is the product of impartial consideration, based on the applicable law and the record before the agency. Of course, we want efficiency, but not at the expense of independent action.

JUST why are the decisions of independent regulatory commissions so vital? Why such interest in these particular agencies? The answer is especially plain to those of us who represent or regulate public utilities. For well do we know the success and welfare of these utilities are determined in large measure by the decisions of such regulatory commissions. The strength and prosperity of our nation, in turn, are vitally intertwined with the welfare of these utilities. These facts are equally clear to those who represent consumers or users of utility services. So also as to those who represent investors in these industries.

In short, I doubt that any one would dispute the obivous importance to the nation of utility rates and services. Ponder the chaos wrought if all utilities stopped functioning for even one day in Chicago, for example. Consider for a moment the investment in the trains, busses, airplanes, and in the facilities of electric, gas, and telephone utilities. And think of the thousands of persons employed by them. Reflect upon the immense revenues necessary to maintain their services and to compensate those whose funds are invested.

It follows, then, that these independent agencies have a dual importance to us. First, they control a vital portion of our entire economy. Second, that control is now, for the most part, exerted in harmony with our constitutional principles, but is susceptible of subtle subversion, with the agencies' independence being replaced by executive control.

The first Hoover Commission was established to study and investigate the agencies of the federal government to determine the changes necessary to bring about greater economy and efficiency in the public service.[2] The present or second Hoover Commission has the same general purposes but with even broader power.[3] The scope of its authority appears to be almost without limit. The direction and extent to which its investigation may go must be judged from press releases, questionnaires, written expressions of its members, such as the splendid article by Robert G. Storey in the June issue of the *American Bar Association Journal*, and personal conversations with members of the commission or its task forces.

I AM pleased to report that such information as I have thus far obtained from these sources is not disturbing, so far as my topic is concerned. I have found no indica-

tion of an intention to disturb the basic concepts underlying the established independent regulatory agencies. And this commission, unlike the first, has established a separate Task Force on Legal Services and Procedures which, it can be hoped, will have a helpful influence on commission recommendations. Fortunately, this task force is composed of able and reputable members of the bar who inspire our confidence that, so far as opportunity permits, they will guide the commission's work and its recommendations along lines consistent with traditional constitutional concepts.

The present commission itself, like the first, is composed of prominent and highly respected citizens, including Mr. Storey, a past president of our association. It is, of course, headed by the same chairman, the venerable former President, Herbert Hoover. One must assume that a group so composed would not knowingly injure the independence of regulatory commissions and that there need be no apprehension on this score. But we must speculate about the action which may be anticipated from the second commission with an eye to the action taken by the first commission with regard to independent regulatory agencies. The first commission indicated its recognition of the necessity for preserving the independent status of regulatory commissions.[4] Nevertheless, I point out, its recommendations and those of its task force on regulatory agencies resulted in the enactment of certain reorganization plans which, in my judgment, distinctly weakened the independent status of several important regulatory commissions.

THE last administration formulated and submitted to Congress on March 13, 1950, similar plans (Nos. 7-13) to reorganize the ICC, FPC, FTC, FCC, SEC, CAB, and NLRB.[5] In submitting these and other plans to Congress, the President apparently viewed them all as designed for "executive" agencies, saying:[6]

> Reorganization Plans No. 1 to 13 propose a bold approach to the problem of delineating responsibility and authority *for the management of the executive branch.* (Emphasis supplied.)

Referring specifically to Plans No. 7 to 13, he said:[7]

> The designation of all chairmen by the President follows out the general concept of the Commission on Organization for providing clearer lines of management responsibility in the *executive branch.* (Emphasis supplied.)

The President also made it clear that the principal objectives of the plans were not original with him, but resulted from the Hoover Commission recommendations.[8]

Foremost among these principal objectives to which I refer was the transfer of the main executive and administrative functions from the commissions to the chairmen. These functions transferred to the chairmen included the appointment and supervision of personnel, distribution of business among personnel and administrative units of the commission, and the use and expenditure of funds. A further principal objective was the naming of the chairman of each commission by the President, in those cases where the law did not already so provide. The object of these proposals was to provide greater efficiency and to "enable the President to obtain a sympathetic hearing for broader considerations of national policy which he feels the commission should take into account."[9]

PARENTHETICALLY, I should point out that certain reservations of authority to the commissions over general policies and specific personnel appointments were included in the plans, which resulted in woefully confusing legislation. As the one who was general counsel of the Federal Power Commission at the time, I am impelled to say that the Reorganization Plan No. 9, which carried out the foregoing recommendations as to that commission, is the most ambiguous enactment it has ever been my unhappy lot to attempt to interpret.

With respect to personnel, expenditure of funds, and direction of staff work—selection of the point at which the authority of the chairman is paramount, on the one hand, and the point at which the commission may by general policy determinations superimpose its will, on the other hand, is a problem of vital concern and one which the plan and its legislative history leave in a fog.

In any event, it is clear that coupling the placement of large amounts of administrative control in the chairmen with a grant to the

President of power to name the chairmen paves the way for any President or administration to bring political or other pressure upon these commissions. For a detailed exposition of this subject, I refer you to the clear and forceful testimony by our recent chairman, Jonathan Gibson, before the Senate committee which considered the reorganization plans.[10]

FOR present purposes, I shall pose an example to illustrate how this authority in the chairman, coupled with the President's power to name him, might work to destroy completely a litigant's right to a fair and impartial hearing before a presumably "independent" commission.

Several years ago, the Virginia Electric & Power Company (Vepco) applied to the Federal Power Commission for a license to construct a hydroelectric project on the Roanoke river. The Army's Corps of Engineers had previously conducted a survey of this river basin and recommended eleven possible sites for dams, only several of which could be used at all for power purposes. Upon learning that Vepco proposed to utilize the best site for a hydroelectric project, the Secretary of Interior petitioned to intervene before the commission. He, himself, argued at a hearing before the commission that it had no authority to issue a license to Vepco and that the site was reserved by law for federal construction. Passing the complicated questions of law and policy, suffice it here to say that the commission had one view of the policy of Congress and the Secretary of the Interior another. A commission decision granting a license to Vepco over the Secretary's objection was sustained, first by the U. S. court of appeals for the fourth circuit and later by the Supreme Court.[11]

Now I believe the President at that time was in sympathy with the views of the Secretary of Interior, and the Secretary's views were consistent with the administration's public power policy which, of course, was a live political issue. Under those circumstances, *if* the President had desired to influence the Federal Power Commission to decide the case in accordance with the administration's policy, he undoubtedly could, consistent with the purposes of Reorganization Plan No. 9, have advised the chairman, named by him, of his views and administration policies and said "I hope you will see that the VEPCO license application is denied." The chairman could then ask the staff what position it proposed to take and which staff witnesses were to testify. If he could not then persuade them that their proposed action would be unwise, since contrary to his desires, he could decide that the case should be handled by other members of the staff more pliable, or perhaps less informed on the facts and the law. Is it likely the staff would defy him? I remind you that Reorganization Plan No. 9 gives the chairman control over the appointment and supervision of personnel, and also over the distribution of business among such personnel.

I WISH to emphasize that the Vepco Case was heard before a trial examiner prior to enactment of the Plan No. 9, and although decided by the commission on exceptions to the examiner's decision after enactment of Plan No. 9, there was no indication of a disposition on the part of the President, to my knowledge, to influence the commission, and its decision was unanimous.

The point is that while we may hope that no President or commission chairman will, even under Reorganization Plan No. 9 or similar enactments, ever attempt to influence the action of commissions in such cases, the danger lies in the erosion of the necessary independence of these commissions by such plans.

At this point, you may ask, if these plans contained such objectionable provisions, how did they obtain the approval of the President and run the congressional gauntlet? The answer is not far to seek. As you may know, under the Reorganization Act of 1949, reorganization plans submitted by the President become law sixty days after submission to the Congress unless disapproved within that time by either house.[12] The principal objective of the first Hoover Commission was to attain greater efficiency in government at reduced cost. Its leadership and personnel were respected. Its recommendations and resulting legislative proposals were considered *prima facie* sound and had popular support. It is noteworthy that no administration has been known for its reluctance to take on increased authority. Conceivably, too, while overlooking the basic concept that quasi-judicial and quasi-legislative functions are for him "be-

yond the pale," the President might favor such a plan as No. 9 as a means for promoting effective functioning by those whom he has appointed.

As for the Congress, the Vice President and the Speaker of the House appointed two-thirds of the membership of the Hoover Commission. This fact would likely suffice to incline an ever-busy Congress to approval of recommendations of such appointees.

DESPITE all of this, when the reorganization plans concerning the independent regulatory agencies were submitted to Congress, resolutions were introduced in the Senate to reject four of them—those relating to the ICC, FPC, FCC, and FTC. Significantly, these resolutions were introduced by the veteran chairman of the Senate Committee on Interstate and Foreign Commerce, Senator Edwin C. Johnson. This committee normally handles all legislation pertaining to the organization of these commissions and presumably its chairman had a closer acquaintance with their functioning than other members of the Senate. Senator Johnson's opposition was based on the executive invasion of the functions of these "arms of Congress," and the proposed departure from the "long-established congressional policy that regulatory agencies must be independent and directly responsible to Congress."[13]

Many of the interests concerned with ICC regulation such as representatives of shippers, railroads, truckers, employees, and the Association of ICC Practitioners appeared before the committee. They analyzed the plan, showing its departure from basic and traditional concepts and the manner of its infringement on that commission's independence. Again, I mention in this connection the splendid, effective presentation by Mr. Gibson.

Similarly, representatives of the FCC Bar Association and the National Association of Broadcasters testified at length in opposition to the plan relating to that agency, and on the same grounds.[14] Except in reference to these two commissions there was little or no testimony in opposition to the entire group of plans. Several commissioners and others testified in support of the various plans.[15]

Incongruously, the plans for the ICC and FCC were disapproved by the Senate, while the plans for the other agencies, containing the same objectionable provisions as the ICC and FCC plans, were allowed to become law. Herein lies the object lesson. Lawyers who were alert to the inherent dangers and actively opposed the plans for the ICC and FCC were able to protect the independence of such agencies. But the silence of lawyers as to the other equally unsound plans, in my opinion, accounts largely for their enactment. Thus, the work of the first Hoover Commission led to an unhealthy degree of control over regulatory commissions by the executive contrary to the doctrine of separation of powers.

I WOULD emphasize one point on which we as lawyers can all agree. The surest road to just decisions is to have our complicated problems presented to qualified and experienced men, for decision on the record, free from political or other pressure. We know that regulation even by "independent" commissions is not perfect. But their very independence has done much to insure, in my opinion, the necessary protection of rights in proceedings conducted in keeping with our traditional constitutional concepts. When defective practices are revealed which prevent due process in administrative proceedings before these agencies, cures may be found in legislation such as the Administrative Procedures Act. But I submit that the subjecting of these commissions to the possibility of political influence or control involves risks which are potentially more dangerous than any procedural or substantive errors we have yet witnessed.

In his recent article which I previously mentioned, Mr. Storey said that lawyers "are closer to the operations of the federal government than any other professional group." We must be alert to any proposals, whether from the Hoover Commission or some other source, which will encroach upon the sound principles of independent regulation. The first Hoover Commission stated its approval of the *theory* that these commissions should be independent. And we may expect that no recommendations will emanate from the second Hoover Commission which will directly, or will intentionally provide for further executive control over the commissions. Experience has shown that we must, however, watch for indirect and even unintended assaults on their independence. For such plans could be hastily approved by a busy and sometimes careless Congress.

SINCE this is the public utility section, our members have more concern with this problem than do lawyers generally. Accordingly, I recommend that the chairman appoint a committee to follow the work of the Hoover Commission and its task forces and report back to the council any indications of proposals affecting adversely the independence of regulatory commissions or which are deemed otherwise harmful, and I further propose that the section authorize the council to oppose in behalf of the section any such proposals, through authorization of testimony by witnesses or through such other means as to the council may seem most effective.

Footnotes

[1] Act of February 4, 1887, 24 Stat 379, 383, 49 USC 1-22.

[2] Act of July 7, 1947, 61 Stat 246, and see note preceding 5 USC 138a and HR Rep No. 704, 80th Congress, 1st Session 2nd (1947).

[3] Act of July 10, 1953, 67 Stat 142, 144, 5 USC 138a-138j.

[4] *E.g.*, The commission's concluding report states, "The major regulatory agencies of the government should continue to exercise quasi-legislative and quasi-judicial functions but the activities which are purely executive in character should be removed from them . . . " See concluding report, "The Commission on Organization of the Executive Branch of the Government," May, 1949, p. 72, and the report, "The Independent Regulatory Commissions," March, 1949, pp. 7 and 16.

[5] Hearings before the Senate Committee on Expenditures in the Executive Departments, 81st Congress, 2nd Session, on S Res 253, 254, 255, and 256, p. 1 (1950).

[6] *Id.*, p. 2.

[7] *Id.*, p. 4.

[8] *Id.*, pp. 3, 4.

[9] "Task Force Report on Regulatory Commissions" (Appendix N) prepared for the Commission on Organization of the Executive Branch of the Government, January, 1949, p. 32.

[10] Hearings before the Senate Committee on Expenditures in the Executive Departments, 81st Congress, 2nd Session, on S Res 253, 254, 255, and 256, pp. 72-89 (1950).

[11] Re Virginia Electric & Power Co. (1951) 87 PUR NS 469, 10 FPC 1, affirmed.

United States *v.* Federal Power Commission (CA 4, 1951) 91 PUR NS 366, 191 F2d 796, affirmed.

United States *v.* Federal Power Commission (1953) 345 US 153, 97 PUR NS 129.

[12] Reorganization Act of June 20, 1949, 63 Stat 203, 5 USC 133z-4.

[13] Hearings, pp. 13-17, *supra*, note 5.

[14] *Id.*, pp. 139-151 and 187-198.

[15] *Id.*, pp. 28, 42, 91, 103.

For Titles and Index to Public Utilities Reports, preprints, see, ante, page 398.

CALIFORNIA PUBLIC UTILITIES COMMISSION

Re San Diego Transit System

Decision No. 50304, Application No. 35231
July 20, 1954

APPLICATION *of transit system for authority to increase rates; modified rate increase authorized.*

Revenues, § 2 — Estimates for the future — Adjustment of records.

1. A statement introduced by an expert witness for a protestant to a transit company's rate increase, showing revised operating revenues for the company for past years and for the first quarter of the current year, which statement was developed from apportionments and adjustments contrary to the accounting records of the company and past decisions of the commission, is of little probative value for the purpose of determining the revenue requirements of the system, p. 139.

Revenues, § 3 — Estimates for the future — Declining patronage.

2. A forecast by an expert for a municipality protesting a transit rate increase that, based upon passenger statistics for a 4-month period, the passenger trend would remain level after a rate increase, was not accepted, since the time period used by the expert was too short to be reliable, p. 139.

Expenses, § 20 — Damage claims — Transit company.

3. Among the factors to be considered in forecasting a transit company's expenditures for injuries and damages are the degrees of responsibility assumed by the company under its insurance policies, the number of passengers to be carried, and the number of vehicle miles to be operated, p. 140.

Expenses, § 22 — Damage claims — Transit company.

4. Exceptional damage claims accruing in recent years against a transit company and expected to be paid or settled during the rate year should not be charged as an operating expense wholly against the riders for that year, p. 140.

Expenses, § 84 — Payments to parent — Management expense.

5. Payments made by a transit company to its parent for management services, based upon percentages of gross revenue and bearing no necessary relationship to either the cost or the value of the management services, were allowed only to the extent of the reasonable cost of the services actually provided the operating company by its parent, p. 140.

Expenses, § 35 — Amortization of retired facilities — Transit company.

6. A transit company's expense for amortization of abandoned rail facilities was allowed in a rate proceeding, notwithstanding a contention that the abandoned facilities provided no benefits to the present bus riders, where reimbursement of the unrecovered portion of the cost of the abandoned rail facilities was a condition upon which the bus substitution was predicated and where, at the time of conversion, it was decided that both the public and management would be served better by amortizing this amount over a 10-

year period rather than by making the impact of this expense felt in one rate year, p. 140.

Depreciation, § 71 — Transit buses.

7. A service life of ten years for buses operating in a city transit system was considered a reasonable basis upon which to determine depreciation in a rate proceeding, p. 141.

Revenues, § 2 — Estimates for current year — Nonrecurring items.

8. A transit company's past disposition of retired buses at a profit does not affect revenue estimates for the current year, where these profits are nonrecurring and where no net credit from such sales is anticipated during the current year, p. 141.

Valuation, § 202 — Transit rate base — Nonoperative property.

9. A transit company will not be permitted to include nonoperative street railway property in its rate base, p. 141.

Expenses, § 114 — Income tax.

10. Income tax expense of a transit company will be computed at the existing rates, notwithstanding a presidential recommendation and possible congressional action restoring a higher rate, p. 141.

Revenues, § 2 — Estimates for the future — Transit fares.

Statement that, in estimating the revenues of the transit company for the future, it must be recognized that an exact prediction as to how many passengers will use cash fares and how many will purchase tokens is impossible, p. 140.

Rates, § 507 — Transit school fares.

Statement that it is in the public interest that school fares be maintained at the lowest reasonable level consistent with the maintenance of necessary service, p. 142.

APPEARANCES: Fred E. Lindley and Leon W. Scales, for applicant; Alan M. Firestone, Aaron W. Reese, and Clarence Winder for the city of San Diego, protestant; Meredith Campbell for the City Council of the city of Chula Vista, protestant; Robert Curran for the city of National City, protestant; B. F. Miner for the Board of Education, San Diego City School District, protestant; J. C. Zauri for the North Island Association, Naval Air Station, protestant; William J. Lyons for the Board of Education, San Diego Unified School District, protestant; Mrs. Orrille E. Hay for the Sunset Secondary Council of 9th District, C.C.P.T., protestant; Mrs. Robert L. Slaughter, in propria persona, protestant; Harold McCarthy and Grant Syphers of the staff of the Public Utilities Commission of the State of California.

Opinion

By the COMMISSION: By application filed on March 8, 1954, San Diego Transit System seeks authority to increase its basic adult fare from 15 cents or one token to 17 cents or one token, to increase the token rate from seven for $1 to three for 50 cents, and to make other increases in student, pass, and commutation fares as hereinafter specified.

Public hearings were held before Commissioner Craemar and Examiner Bryant in San Diego on May 19, 20, 21, 24, and 25, 1954. On the latter date the application was submitted. It is ready for decision.

San Diego Transit System is engaged in the transportation of passengers by motorbus within and between the cities of San Diego, Coronado, National City, Chula Vista, La Mesa, and El Cajon, and adjacent areas. Its present fares were authorized effective August 10, 1953, following public hearings held in June, 1953. The company now alleges these fares do not yield a sufficient income to provide a fair return on its investment, nor to permit maintenance of a satisfactory operation for the public it serves. According to the application the company has experienced increased wages and taxes and a substantial decrease in revenues resulting from reduced volume of passengers carried. The principal cost increases since June, 1953, as stated in the application, are as follows:

	Increase on an Annual Basis
Wages of Drivers and Receiver Clerks	$135,530
Wages of Garage and Service Personnel	37,158
Wages of Garage Foremen and General Office	28,320
Social Security Tax	14,560
Taxes on Gasoline and Diesel Fuel	26,140*
Motor Vehicle Tax	7,350*
Total Increased Costs Not Reflected in Estimates of the 1953 Rate Case	$249,058

* In addition to the tax increases which were included in the estimates for the 1953 rate proceeding.

San Diego Transit System asserts that it consistently has improved efficiency and held operating costs to the lowest practicable basis. It states that it is doing all it can to decrease expenses by adjusting schedules to accomplish proper but not excessive service on its routes, and that its costs cannot be reduced further by any appreciable amount without impairing the standards that are necessary for adequate public service. Applicant declares that in its situation of insufficient earnings a choice has to be made between a complete loss of net earnings at present fares on the one hand, or an increase in fares with some loss of volume of passengers on the other hand. The company states that an increase in fares is necessary in order that it may continue adequate service with well-maintained equipment.

Applicant's fare structure is based on a zone system with seven zones radiating from the business center of the city of San Diego. The present fares and those herein proposed are shown in some detail in footnote 1 on the following page.

Detailed estimates of operating results under the present and proposed fares were submitted by the applicant and by members of the commission staff. Applicant's witnesses included a consulting engineer experienced in public transit matters, the president of San Diego Transit System, its general manager, its vice president and comptroller, and its claim agent. The exhibits submitted by the company witnesses and by transportation engineers of the commission staff included operating statements, analyses, and studies of traffic trends, rate base statements, studies of services and operations, and the forecasts of estimated results of operation for the future year.

The figures set forth in the following tables were taken from these exhibits.

Table 1

Results of Operation under Present Fares
for Year Ending March 31, 1954
As Recorded on the Company's Books

Revenue	$6,268,016
Operating Expenses (1)	4,894,755
Amortization	134,257
Depreciation	554,402
Operating Taxes	513,618
Total Operating Expenses (2)	$6,097,032
Net Before Income Taxes	$170,984
Income Taxes	$56,120
Net Operating Income	$114,864
Operating Ratio	98.2%*
Rate Base (3)	$3,407,560
Rate of Return	3.37%

(1)—Excluding amortization, depreciation and taxes.
(2)—Exclusive of income taxes.
(3)—Net investment plus materials and supplies at mid-point of the year, as determined by commission staff.
* Corrected figure.

Table 2

Estimated Results of Operation For Rate Year Ending May 31, 1955

	Under Present Fares		Under Proposed Fares	
	Applicant	Commission Staff	Applicant	Commission Staff
Revenue	$5,608,000	$5,664,714	$6,080,500	$6,131,625
Operating Expenses (1)	4,751,050	4,505,710	4,696,620	4,472,590
Amortization	112,180	112,524	112,180	112,524
Interest on Rail Retirement (2)	.....	30,228	.....	30,228
Depreciation	582,830	498,976	582,830	498,976
Operating Taxes	520,520	510,030	527,740	517,520
Total Operating Expenses (3)	$5,966,580	$5,657,468	$5,919,370	$5,631,838
Net Revenue (3)	$(358,580)	$7,246	$161,130	$499,787
Income Taxes (4)	$	$25	$136,620	$240,530
Net Operating Income (5)	$(358,580)	$7,221	$24,510	$259,257
Operating Ratio (5)	106.3%	99.9%	99.6%	95.8%
Rate Base	$3,380,100	$3,387,630	$3,380,100	$3,387,630
Rate of Return (5)	.....	0.2%	0.7%	7.65%

Explanation of Notes:
(1) Exclusive of items which follow.
(2) Interest at 6% on $503,804.72, unamortized loss on retirement and dismantling cost of rail facilities.
(3) Before provision for income taxes.
(4) On basis of 52% federal tax. The commission staff study for proposed fares was computed also on basis of a 47% tax, with results as follows: Income Taxes, $218,628; Net Income, $281,159; Operating Ratio, 95.4%; Rate of Return, 8.3%.
(5) After provision for income taxes.
( )—Loss

	Present Fare	Proposed Fare
[1] Within any one or two zones	15¢ or 1 token (7 for $1.00)	17¢ or 1 token (3 for 50¢)
Additional zones	$ .05	$ .05
Weekly passes thru zones 1 & 2	2.75	3.25
School passes or school tickets	1.80	2.10
" " " " "	2.40	2.80
" " " " "	3.00	3.50
" " " " "	3.50	4.10

It will be noted that the proposed adult fares in the sixth and seventh zones would be increased to 37 cents and 42 cents, respectively. These fares would be subject to a 10 per cent federal excise tax. Applicant proposes to issue 10-ride commutation books for $3.50 and $4 in the sixth and seventh zones, respectively, on which no federal excise tax would apply. The school passes are for calendar months. The school tickets are for 40 rides. The present and proposed fares are shown in full detail in appendices to the application of record.

It will be observed that the annual revenues under present fares are lower in Table 2 than in Table 1 by amounts in excess of $600,000. The explanation lies in the fact that Table 1 is a past record whereas Table 2 covers a future period for which a substantial decline in patronage is forecast. The traffic forecasts will be discussed hereinafter.

The commission staff submitted also an estimate of operating results for the future rate year under two alternate fare structures, as summarized in Table 3.

Table 3

Staff Forecast, Alternate Fares

	Alternate 1	Alternate 2*
Revenue	$6,121,626	$6,032,658
Total Operating Expenses	5,631,598	5,638,508
Net before Taxes	$490,028	$394,150
Income Taxes (1)	235,268	183,570
(2)	213,834	166,740
Net Operating Income (1)	254,760	210,580
(2)	276,194	227,410
Operating Ratio (1)	95.8%	96.5%
(2)	95.5%	96.2%
Rate Base	$3,387,630	$3,387,630
Rate of Return (1)	7.5%	6.2%
(2)	8.2%	6.7%

Explanations:
Alternate 1 is same as proposed by applicant but with no increase in Zones 6 and 7. Alternate 2 is same as proposed by applicant except that token rate would be 5 for seventy-five cents.
(1)—Assumes Federal Income Tax at 52%.
(2)—Assumes Federal Income Tax at 47%.
* Corrected.

None of the other parties submitted forecasts of operating results to be anticipated from the operation of San Diego Transit System under the existing fares or any other fare structure.

The city of San Diego, appearing as a protestant, participated actively in the proceeding and opposed the granting of any increase in fares. It introduced evidence through its utility rate consultant and one of its auditors.[2]

The consultant commented generally upon the estimates and other data submitted by the applicant and by the commission staff. Among other things, he challenged the revenue forecasts and criticized the company's charges to expense for depreciation of vehicles and for management. He also made suggestions regarding routes, fare zones, and other service matters which will be referred to hereinafter. This witness expressed the opinion that a fare increase for San Diego Transit System is not justified at the present time.

The auditor, a certified public accountant, introduced and explained an exhibit which he had prepared consisting of a review of the financial reports of San Diego Transit System for the period January 1, 1950, through March 31, 1954. The applicant moved that all of the testimony of this witness be stricken on the grounds (1) that it consists of opinions expressed on a subject concerning which the witness was not qualified as an expert; (2) that it relates entirely to matters that are not in issue; (3) that it relates to previous years that are not relevant; (4) that it deals entirely with accounting procedures advocated by the witness but different from those prescribed by the commission; and (5) that it is hearsay because the witness

[2] There was introduced into the record a resolution of the council of the city of San Diego authorizing the city attorney and the rate consultant to appear at the hearing and to protest the granting of this application.

made no examination of the books of San Diego Transit System.[3]

Other witnesses were an assistant to the superintendent of San Diego city schools, a representative of the Parents and Teachers Association, and a patron of San Diego Transit System testifying in her own behalf. These three witnesses submitted evidence concerning the ability of the riders to pay increased fares, and offered opinions concerning the effect which higher fares would have upon patronage of the buses. The school representative testified that for each of the past several years the enrollment has increased about 8 per cent a year. He introduced an exhibit showing the enrollment and average daily attendance in the San Diego city schools for the months of February, 1953, January, 1954, and February, 1954.

The cities of Chula Vista and National City entered appearances as protestants but did not offer evidence. The commission staff was represented by counsel in the public interest and for the purpose of facilitating the introduction of the staff evidence.

Closing argument was made only by the city of San Diego. In addition to urging that the application be denied, it urged as a motion that the commission (1) review very thoroughly the item of expense for management services and also investigate the affiliated city transit systems with a view to determining whether it is a public utility subject to commission jurisdiction, (2) review its prior decisions regarding the amortization of losses on retired rail facilities "to determine whether or not the present bus riders of San Diego Transit System should still be asked to bear the burden of those old losses," and (3) review the depreciation policies not only of the applicant but of the commission staff to determine whether or not the actual experience of this company does not require a different depreciation theory as applied to the buses.

As the foregoing summary indicates, many controversial points and issues were raised during the course of the hearings in this proceeding. They will be considered further under the general headings which follow.

Operating Revenues

The applicant estimated that 32,121,000 adult revenue passengers would be carried during the future rate year under present fares, and that under proposed fares the number of passengers would be reduced to 30,587,000. The comparable commission staff estimates were 32,110,000 and 30,560,000, respectively. Although the two estmates are virtually the same, they were developed independently and under different methods. The company consultant used a composite weekly annualized projection, giving weight to past trend, current indications, deviating influences, and reaction of San Diego population to increases in fare as evidenced by analysis of the past behavior patterns. According to his exhibit the traffic of San Diego Transit System during the spring of 1954 was more than 14 per cent below that of the corresponding months of 1953. For the future year he forecast a comparable

[3] The motion will be denied hereinafter. The comments and opinions of the auditor will be considered herein to the extent that they are germane to the disposition of this proceeding.

decline of nearly 13 per cent. The commission engineer analyzed and plotted the passenger figures for the past several years, but based his projection essentially upon the period from the last week in September, 1953, to the last week in April, 1954. He explained that this period was selected because it was the latest one for which there was no distortion from fare adjustment or other change. From his analysis of the passenger statistics he developed an annual downtrend of approximately 11.5 per cent. The consultant for the city of San Diego declared that the forecasts of a declining trend in passenger volume were not realistic. It was his conclusion, based upon the passenger statistics for the period from January through April 1954, that the passenger trend was level.

Despite the similarity in their estimates of traffic volume, the company witness and commission witness differed materially in their forecasts of total operating revenue as shown in the following tabulation:

	Present Fares	Proposed Fares
Applicant	$5,608,000	$6,080,500
Commission Staff	5,664,714	6,131,625
Difference	$56,714	$51,125

Several items contribute to the difference in the revenue figures. The principal factor is that the percentage of token use was estimated differently by the two witnesses. The applicant estimated that about $1,490,000 would be received from token sales at present fares, while the corresponding staff figure was $1,580,000. At the proposed fares the applicant estimated a relative token use of 75 per cent, while the corresponding staff estimate was 45 per cent.

Vehicle Mileage

Many of the items of operating expense are affected directly or indirectly by the number of miles that the vehicles are to be operated during the year. In this proceeding the applicant, the commission staff, and the city of San Diego are in basic agreement concerning the vehicle mileage which will be required. The record shows that the traffic has declined and that some reduction in schedules can be made without departing from established service standards. According to the evidence, schedules first proposed by the commission engineer were discussed fully with representatives of San Diego Transit System and with the consulting engineer retained by the city of San Diego. The parties are in agreement that the reductions in vehicle mileages will result in operating economies which are in the interest of both the applicant and the general public. The expense estimates of record were predicated upon the economies to be thus effected.[4]

Injuries and Damages

There is a considerable variation in the estimates of expenses to be incurred on account of injuries and damages. The record is clear that San Diego Transit System has had an ex-

[4] For comparative purposes the commission engineers submitted an estimate of operating results which would obtain if all of the schedules in effect in April, 1954, were to be operated without change during the future rate year. On this service basis his estimate shows that the proposed increased fares would result in an operating ratio of 98.7 per cent and a rate of return of only 2.4 per cent.

ceptionally favorable safety record.[5] The evidence shows also, however, that applicant is confronted currently with claims larger in amount and involving injuries of greater severity than in recent past years. Applicant's expense for injuries and damages approximated $92,000 for the year ending March 31, 1954. The company estimates that the expense for the rate year will be $198,400. The commission engineer used an expense forecast of $98,300. Both estimates were based upon analysis of past experience and pending claims. The substantial difference results principally from a difference in treatment. The company included the entire amount expected to be paid out in claims during the year. The engineer used the estimated amount for claims which would arise and be settled during the year plus only one-third of the estimated cost of the past claims now pending. He explained that he would amortize the past claims over a 3-year period in order to bring the cost of injuries and damages to a current basis rather than a cash basis.

Management Expense

San Diego Transit System recorded management expense of $200,040 for the year ending March 31, 1954. For the rate year the company estimates are $180,240 under present fares and $194,415 under the proposed fares. The commission staff used a figure of $102,000 under either fare basis. The witnesses for the city of San Diego criticized the basis used by the company for determining management expense and indicated a preference for the method used by the commission staff. Counsel for the city of San Diego declared that the commission should decline to allow any management expense at all because the company did not disclose fully the management services received or the cost thereof. He moved that the commission refuse to allow any consideration of management expense in this case due to the lack of evidence to substantiate the charge.

The circumstances giving rise to the differing contentions of the parties may be stated briefly. The capital stock of the San Diego Transit System is owned by the City Transit Systems. The latter company provides the executive direction, management, and supervision of San Diego Transit System under a management agreement. By the terms of a contract between the two companies the applicant pays to the City Transit Systems for such services 5 per cent on the first $50,000 a month of gross revenue and 3 per cent on all gross revenue in excess of $50,000 a month. In lieu of the management expense thus claimed by the company, the commission in past proceedings has used an amount determined from analysis of the actual known management costs pertaining to the same properties prior to the existence of the present management contract, with upward adjustments as necessary to compensate for increased salaries paid to certain office employees. The commission staff used the same basis in its forecasts in the pres-

[5] The record shows that San Diego Transit System has a lower expense per dollar of revenue for injuries and damages than the average of the other major transit companies operating in this state; and that the company recently received national recognition for safety among transit companies serving cities of population comparable to San Diego.

ent proceeding, making adjustments necessary to reflect current circumstances.

Rail Amortization

Both the applicant and the commission staff included in operating expenses an amount of approximately $112,000 for amortization of rail facilities.[6] In brief, this figure represents the gradual extinguishment of an amount equivalent to the net cost of track removal, repairing of streets, dismantling street railway facilities and car house, and the recovery of the undepreciated investment in rail facilities retired from service incident to the substitution of motor coach for rail operation. The amortization has been provided for in prior decisions of the commission as cited hereinafter. The city of San Diego urged in the instant proceeding that the commission should reverse its earlier conclusions and disallow any expense for amortization of abandoned rail facilities or interest on the unamortized balance, apparently on the principal ground that the abandoned facilities provide no present benefit to the bus riders.

Depreciation

Depreciation for the rate year was estimated by the company at $582,830 and by the commission staff at $498,976. A principal reason for the substantial difference is that the applicant used an 8-year service life for the vehicles (with a $500 salvage allowance) while the staff used a 10-year service life (with a $50 salvage allowance). Applicant's consultant testified that in his opinion the 8-year life provides a proper recognition of the risk invoved in this type of business and a realistic approach to the company's financial problems. He said also that this is the service life used by the comapny in computing its income tax returns. The commission engineer explained that his 10-year basis is that used generally by the commission staff in connection with rate proceedings of other transit companies, and had been used by the commission in deciding the 1953 rate application of San Diego Transit System (Decision No. 48867, 52 Cal PUC 691).

The witnesses for the city of San Diego urged that a still longer service life should be used for depreciation purposes. Its auditor submitted calculations based upon a 10-year life for the gasoline buses and a 14-year life for the diesel buses, with salvage values of $1,125 for the gasoline vehicles and $2,589 for the diesel vehicles. The witnesses for the city of San Diego declared further that any profits from the sale of retired buses should not be credited to nonoperating income as recorded by the company, but should be treated as a depreciation adjustment. The record shows that San Diego Transit System has operated many of its vehicles for more than ten years, and also that upon retirement some of the vehicles have been sold at a profit.

Rate Base

The estimated average rate base for the rate year was $3,380,100 as submitted by the applicant and $3,387,630 as submitted by the commission staff. The difference between these two figures is negligible for rate purposes, but their similarity is largely a matter of coincidence. Applicant's figure in-

[6] Applicant, $112,179; commission staff, $112,524.

cludes $407,558 for nonoperative rail facilities. This item was excluded by the staff. On the other hand, the staff item for depreciated investment in revenue equipment is $412,691 greater than the comparable figure of the applicant.

The applicant submitted also, for alternative consideration, a rate base of $4,971,300. This base includes as "additives" approximately $280,000 for working cash and $1,310,000 for value in excess of the net book value of land, revenue equipment, and shop and garage structures. The added items are those which have been claimed and rejected by the commission in prior rate proceedings of this company. Applicant showed these items separately in order to limit the area of controversy. It considered that the proposed rates would return inadequate revenues as measured by either rate base.

The city of San Diego did not submit an estimated rate base.

Service Matters

A staff engineer introduced an exhibit consisting of a report on his investigation of service and operations of San Diego Transit System. He testified that the service has been more than adequate to meet traffic requirements, and that the buses are well maintained mechanically and in appearance. His exhibit sets forth the schedule reductions referred to hereinbefore in connection with the consideration of vehicle mileage. These schedule changes have no reference to a proposed discontinuance of certain West Point Loma and Mission Beach shuttle lines as sought by the applicant in another proceeding (Application No. 35295). That application is under submission and has not yet been decided by the commission.[7]

The consultant for the city of San Diego made various comments and suggestions regarding the service of the San Diego Transit System. He submitted an exhibit showing variations in length of ride for a given fare under the existing zone pattern, and urged "that a great deal of study should be given to the pattern of the San Diego Transit System fares by the commission." This witness suggested also that consideration should be given to the establishment of crosstown lines to provide direct service between La Mesa and El Cajon, on the one hand, and aviation plants and military training centers along Pacific Coast Highway in San Diego, on the other hand. He pointed out that such a service would obviate movement through and transfer in the downtown area of San Diego. He did not elaborate upon his proposal to the extent of specifying routes or estimating costs. A commission engineer, referring to the same subject, said that the most commonly suggested route for a crosstown line is along Washington street between Fifth avenue and Pacific Coast highway. This witness said that such a line would be primarily a shift-change shuttle operation. He testified that in his opinion it was "ex-

[7] For the purpose of the revenue and expense forecasts in the instant application a commission engineer testified that if the shuttle abandonments are authorized the combined saving to San Diego Transit System will approximate $10,700 for the rate year. Since this amount is no more than three-tenths of one per cent of the rate base, it is evident that whatever disposition is made of the shuttle application the effect upon the net revenues of the San Diego Transit System will not be measurable directly in so far as the fares are concerned.

tremely doubtful" that it would produce sufficient revenue to meet the costs of operation.

Conclusions

[1] From all of the evidence before it the commission must make its determination whether or not, or to what extent, the proposed increased fares are justified within the meaning of § 454 of the Public Utilities Code. It will be seen that the only detailed estimates and forecasts of operating revenues and expenses are those submitted by the officers and consultant of San Diego Transit System and by the transportation engineers of the commission staff. While the auditor for the city of San Diego introduced a statement of revised operating revenues for past years and for the first quarter of 1954, his revisions are based upon apportionments and adjustments contrary to the accounting records of the company and to the past decisions of this commission. They have little probative value for the purpose of determining the revenue requirements of San Diego Transit System. Since the city of San Diego offered no forecast of future operating results, the basis of its conclusion that an increase in the fares is unnecessary and that the application should be denied is not clear.

The auditor's investigation and report were completed in about three weeks and were accomplished without reference to the accounting records of the company.[8] He was concerned chiefly with the determination of past earnings and with inconsistencies in accounting practices. The consultant for the city of San Diego made no special study for the purpose of this proceeding beyond an examination of the company's annual and monthly reports. His testimony was substantially an expression of his philosophy of rate making and his general observations in connection with the San Diego Transit System. He criticized the management of the company for seeking rate relief "until such a time as they had made some effort to relieve the situation through their own efforts." In disagreeing with the forecasts of the applicant and of the commission staff he did not submit estimates of his own.

The estimates, as submitted by the applicant and by the staff, were prepared and explained in substantial detail, and were accompanied by supporting data to make clear the bases underlying the estimates. It is to these studies primarily that the commission must look for the facts necessary to its conclusions in this proceeding.

[2] With reference to the operating revenues of San Diego Transit System, it is concluded that the traffic currently is following a reasonably predictable downtrend as determined by the company and by the commission staff rather than a level trend as stated by the consultant for the city of San Diego. The time period used by the consultant is too short to be reliable. With reference to the token usage, it must be recognized that while estimates can be made within reasonable limits, exact prediction is impossible. The decision whether to pay a cash fare or to purchase tokens is made on an individual basis by each rider, and

[8] He explained that his investigation was based upon financial reports, supporting statements, and miscellaneous data furnished by the company.

in final analysis the token usage will be determined by human nature and the reaction of many individuals. It is concluded that the token forecasts of the staff are based upon sound and considered analysis of the probabilities. Upon the facts of record the commission finds that the revenue estimates as submitted by the commission staff, as summarized in Table 2 under present fares and proposed fares, are reasonable. They will be relied upon for purposes of this decision.

[3, 4] There are many factors to be considered in forecasting expenditures for injuries and damages. Among them are the degrees of responsibility assumed by the company under its insurance policies, the number of passengers to be carried, and the number of vehicle miles to be operated. The company's estimate in this proceeding appears to be reasonable in many respects. For rate purposes, however, the exceptional claims accruing in past years and expected to be paid or settled during the rate year should not be charged in this instance as an operating expense wholly against the riders for that year. Upon careful consideration of the evidence it is concluded that the estimate of $98,300 as submitted by the commission staff will be reasonable for purposes of the present application. Experience will determine to what extent and in what manner the amortization suggested by the staff engineer should be considered in the future.

[5] Management expenses claimed by San Diego Transit System have not been accepted by the commission in past rate proceedings. The essential objection is that payments based upon percentages of gross revenue bear no necessary relationship to either the cost or the value of the management services. On the other hand, it would be inequitable if not confiscatory for the commission arbitrarily to disallow all management expenses as suggested by the city of San Diego. Its motion to that effect will be denied. Regardless of the terms of the management contract, there can be no question that the reasonable costs of managing the operations of San Diego Transit System are real and substantial. Such costs must be recognized as proper operating expenses to be provided for in the fares. It is concluded that the commission staff estimates make reasonable and proper provision for management expense.

[6] At various times in the past, with the approval and endorsement of the city of San Diego and under authority granted by this commission, the applicant abandoned street car lines and substituted motorbus service in order to provide a more convenient and economical service for the public. The company had not been fully reimbursed through the depreciation accounts for its investment in the rail facilities. Throughout the entire life of most of the property the depreciation expense had been approved and funded under the supervision of this commission. Reimbursement for the remaining undepreciated cost of the abandoned rail facilities was a condition upon which the bus substitution depended. The total undepreciated amounts at the time would have resulted in an excessive impact in the operating expenses for any one year. The commission concluded that both the public and the company would be served better by amortizing these non-

recurring costs over a period of years and allowing interest on the unrecovered balances. The commission authorized the applicant to amortize the undepreciated balances over a period of ten years, together with the net cost of dismantling, incidental paving, and the cost of disposition of the rail facilities. In support of its position on this point the city of San Diego offered no facts which have not been considered fully by the commission heretofore.[9] The amortization item will be recognized as a proper operating expense for the purpose of this proceeding.

[7] Upon consideration of all of the evidence it is concluded that a service life of ten years for the buses is a reasonable basis upon which to determine depreciation expenses in the present application. With reference to the disposition of retired buses, the commission agrees with the city of San Diego that any profit from the sale of such buses should be credited to the depreciation adjustment account and not to nonoperating income. The uniform system of accounts prescribed by this commission requires such treatment, as specified in Instruction No. 21 thereof. San Diego Transit System is directed to observe and conform to the prescribed accounting procedure.

[8] Applicant's past disposition of retired buses does not affect the estimates for the rate year. The revenues are unaffected because the bus-sale profits are nonrecurring and it does not appear that any net credit from such sales is anticipated during the rate year. The rate base hereinafter adopted was developed without regard to the depreciation accounting recorded on the company books in so far as the buses are concerned.

[9] The rate base estimate of $3,387,630 as submitted by the commission staff was developed by methods consistent with the prior decisions of this commission. The inclusion of amounts for nonoperative rail property, as claimed by the applicant in its rate base estimate, is contrary to the express holding of the commission in its Decision No. 45279 dated January 16, 1951, as reported at 50 Cal PUC 410, 417, 88 PUR NS 459. The alternative rate base offered by the company, with its "additives" for working cash and for values in excess of the net book value for land, equipment, and structures, is not acceptable. The disputed "additives" have been considered in prior decisions and no purpose would be served by further discussion herein.[10] The rate base of $3,387,630 as submitted by the commission staff is reasonable and will be adopted.

Based upon all of the evidence and the conclusions hereinbefore appearing, the commission finds that the estimated revenues, expenses, and rate base as developed by the commission staff and summarized in the foregoing Table 2 under present and proposed fares are reasonable. These estimates constitute a sound basis upon which to predicate the order in this proceeding, and are hereby adopted by the commission for such purpose.

[10] As hereinbefore indicated in Table 2, the applicant in its forecasts used a federal income tax of 52 per

[9] See Decision No. 42203 ([1948] 48 Cal PUC 309), Decision No. 42649 ([1949] 48 Cal PUC 616), and Decision No. 45279 ([1951] 50 Cal PUC 410, 88 PUR NS 459).

[10] See Decision No. 47411, dated June 30, 1952, in Case No. 5332 (unreported), and decisions cited therein.

cent (30 per cent normal tax and 22 per cent surtax) while the commission staff submitted calculations on two bases, that is, 52 per cent and 47 per cent. The commission takes official notice of the facts that the federal income tax rate became 47 per cent on April 1, 1954, and that the President has recommended that Congress enact legislation restoring the 52 per cent rate. Congressional action on such recommendation has not been determined and made final. The present rate of 47 per cent will be adopted for the purpose of this proceeding.

Consideration has been given also to the proposed fare plan by which the applicant would achieve the estimated operating results. In particular the evidence in opposition to the adjustment of the school fares has been carefully considered. There are reasons in the public interest why school fares should be maintained at the lowest reasonable levels consistent with the maintenance of the necessary services. It is concluded that those sought to be established by the applicant in this proceeding are at the low levels required by the public interest.

The foregoing discussion, with its conclusions and findings, essentially resolves all of the disputed matters for the purpose of determining the issues in this proceeding. Responsive to the motions made by the city of San Diego, the commission staff will review and further study the records, accounts, and practices of San Diego Transit System and City Transit Systems with relation to management services and charges, amortization and depreciation accounting of San Diego Transit System, and other related matters. At the same time the matter of the establishment of cross-town lines and a general study of applicant's zone system which was suggested by the city of San Diego should be given consideration by applicant in co-operation with said city.

These further investigations necessarily will require some months to complete. In the meantime the present application will be decided upon an interim basis on the record as adduced, without prejudice to and not contingent upon the results of any subsequent study, investigation, or proceeding.

San Diego Transit System is well financed. As of May 31, 1954, it reported its net investment in assets at $4,739,018, which had been financed by equipment obligations of $1,293,856 and equity capital of $3,445,162. The following tabulation developed from the annual reports filed with the commission, indicates the earning position of the equity capital.

Common Capital Stock, 30,000 Shares Outstanding, Par Value Per Share $100.

Year	Earnings Per Share	Book Value Per Share	Earnings on Equity Capital	Dividends Per Share
1953	$2.66	$115.72	2.30%	$6.66
1952	11.35	119.72	9.48%	10.00
1951	14.86	118.37	12.56%	3.33
1950	5.37	106.84	5.02%	3.33
1949	4.51	102.04	4.42%	5.00

It will be seen that the earnings on equity capital for the year 1953 were the lowest in recent years. Historically the operations of San Diego

Transit System have been highly sensitive to changes in military and defense activities in the San Diego area. The company has experienced extreme variations in traffic in the past. Its traffic currently is following a downward trend which is serious and relatively severe, as indicated by the figures which appear hereinbefore.

From all of the evidence it is clear that the earning position of San Diego Transit System must be improved without unnecessary delay if the company is to continue rendering the essential services which it performs for the public of San Diego and other cities and communities. The needed improvement in earnings can come only from an increase in gross operating revenues or a decrease in operating expenses or some combination of these two factors. The evidence is convincing that San Diego Transit System has been well managed and that all feasible operating economies are being effected. So far as is now evident, any substantial improvement in net revenues must depend upon an increase in fares. The commission must permit reasonable earnings in order that public services may be preserved.

Under applicant's proposal to make tokens available at the rate of three for 50 cents the token fare would be equivalent to 16⅔ cents. If the token fare were established instead at 16 cents, based upon sales at the rate of five tokens for 80 cents, it is estimated from all of the evidence that the operating results for the rate year would be as follows:

Revenue	$6,077,416
Total Operating Expenses	5,631,668
Net Operating Income before Taxes	445,748
Income Taxes (1)	211,390
(2)	192,080
Net Operating Income (1)	234,358
(2)	253,668
Operating Ratio (1)	96.1%
(2)	95.8%
Rate Base	$3,387,630
Rate of Return (1)	6.9%
(2)	7.5%

(1) Based on 52% federal tax.
(2) Based on 47% federal tax.

Upon careful consideration of all of the evidence of record the commission concludes and finds as a fact that the estimated operating results under this alternate basis of fares will be reasonable; that the fares proposed by the applicant, thus modified as to the token rate, are reasonable; and that such increased fares are justified. To this extent the application will be granted.

If congressional action should make a 52 per cent income tax rate effective, and the results should indicate the need for further revenues, the applicant may, by supplemental application, seek any justifiable relief.

Further hearings will be scheduled in any event when the commission staff, the San Diego Transit System, and the city of San Diego have completed their further studies and investigations as aforesaid.

UTAH PUBLIC SERVICE COMMISSION

Re Salt Lake City Lines

Investigation & Suspension Docket No. 95
March 17, 1954

APPLICATION *by transit company for authority to increase rates; modified rate increase authorized. For earlier commission decision, see (1953) 2 PUR3d 405.*

Return, § 14.1 — Use of operating ratio — Transit company.

1. The adequacy of the earnings of a transit company can be tested by the use of an operating ratio, that is the relationship of the carrier's expenses to its revenues, usually expressed in percentage form, p. 145.

Return, § 108.1 — Transit company — Operating ratio.

2. A contention that a transit company had to have an operating ratio of not more than 90 to 92 if its earnings were to be reasonable and that a ratio above 92 was in the critical range was not accepted, p. 146.

Rates, § 504 — Transit — Weekly pass and student fare.

3. A transit company was ordered to retain in its schedule a weekly pass and a special student rate, with each being required to stand an equitable part of any over-all rate increase authorized, where it appeared that these fares should be continued in the public interests, p. 148.

Return, § 108.1 — Transit company — Operating ratio.

4. A transit company was authorized to increase its rates so that its operating ratio, after federal income tax, would be 93.3 per cent, even though the earnings under such ratio would be somewhat higher than actually necessary, where this ratio was justified to permit the company to comply with commission directions respecting improvement of service, p. 148.

Rates, § 131 — Increase — Service Inadequacies — Transit.

5. A transit company was authorized to increase rates notwithstanding contentions that service was inadequate and that the company had not even commenced an engineering study to determine what should be done to improve service, where a rate increase was necessary, in the face of declining patronage, to guarantee the company sufficient revenue to continue its service and where the safest course appeared to be to grant an increase with the condition that the company take immediate steps to make a survey and promptly report concerning its results, p. 149.

Expenses, § 84 — Management fee to parent — Declining revenue.

Statement that it is difficult for the commission to reconcile a substantial increase in the fee paid by a transit company to its parent under a contract for managerial services with a picture of declining revenue, since business in general ordinarily would seek means to reduce management expenses in the face of depressed revenues, p. 148.

APPEARANCES: Calvin L. Rampton, for Applicant; Peter M. Lowe, Deputy Attorney General, for Public Service Commission of Utah; Louis J. Scarlet, for Amalgamated Ass'n of Employees, Division 382; Mrs. Rupert Soderberg, for Parent Teachers Association, Salt Lake District Council; Lorenzo E. Elggren and N. A. Jensen, for Consumers' Welfare League; W. Rook and Chris P. Jensen, for Aged Recipients of State Welfare; Mrs. J. H. Olsen, for South Central Improvement League; Joseph A. White, for Self; C. L. Clayton, for Self; James McQuiston, for Self; Mrs. T. Straup, for Self; Richard K. Winters, Thomas Green, and Duayne Stufflebeam, for Associated Students of the University of Utah.

By the COMMISSION: This proceeding was initiated by the commission upon the filing of Tariff No. 6, P.S.C.U. No. 6, by Salt Lake City Lines, on July 15, 1953, stating increased fares to become effective August 14, 1953. The adequacy of the earnings of Salt Lake City Lines is at issue. A hearing in this matter was held in September and October, 1953. On November 18, 1953 [2 PUR3d 405] the commission issued its findings and ordered that the then existing rates of Salt Lake City Lines as published in Passenger Tariff No. 5, P.S.C.U. No. 5, should remain in full force and effect unless and until modified by further order of the commission. Jurisdiction of the matter was retained by the commission and Salt Lake City Lines was required to file monthly statements of revenues, expenses, number of passengers carried, and number of vehicle miles operated.

Salt Lake City Lines filed a "Petition for Supplemental Order" with the commission on January 26, 1954, in which it alleged that it is in "immediate and drastic need of increased revenues in order to continue to render adequate bus service to the riding public of the Salt Lake Metropolitan area." A hearing on this petition was held on February 18, 1954, pursuant to notice regularly given.

[1] From the evidence of record the commission now makes the following findings:

1. Salt Lake City Lines (City Lines) is a corporation of the state of Utah. It renders mass transportation service in Salt Lake City and certain suburban areas adjacent thereto. All of the common stock of City Lines is owned by National City Lines, Inc., (National) except for directors' qualifying shares.

2. The fares proposed in Passenger Tariff No. 6 compared with the fares stated in Tariff No. 5 are as follows:

	Tariff No. 5 (Present)	Tariff No. 6 (Proposed)
Adult—cash (one zone)	$.10	$.15
—token (one zone)	...	2/.25
each additional zone	.10	.10
Weekly pass	1.75	eliminated
Children—(5 to 12)	.05	.05
each additional zone	.05	.05
Students—cash (one zone)	.05	Adult fare
each additional zone	.05	Adult fare

The area served by City Lines is divided into four zones for fare purposes under existing regulations. Zone four embraces the area from

10400 South and Redwood road to 14400 South and Redwood road. Under the provisions of Tariff No. 6 the fourth zone would be eliminated and this area would be made a part of the third zone.

3. Since the close of World War II there has been a continuous decline in the patronage enjoyed by City Lines, particularly during evening hours and on holidays and Sunday. Increased use of private automobiles undoubtedly is the primary reason for the loss of passengers. Other factors, such as television and drive-in theaters, also have contributed to such decline. As noted below there has been a substantial decrease in mileage operated with the accompanying longer headways, and this fact in and of itself undoubtedly has been responsible for some loss of riders. The following figures, covering revenue passengers carried, illustrate what has happened in post-war years. The year 1946 is used as the base year, or 100.

Year	Index
1946	100
1947	95
1948	91
1949	86
1950	74
1951	67
1952	59
1953 (August)	52

In 1946 City Lines transported 33,106,089 revenue passengers. The figure had dropped to 19,653,459 in 1952. In the face of such decline it was inevitable that curtailments in mileage operated would be necessary. During the year 1946 City Lines operated 6,103,789 miles on regular routes, compared with 4,238,486 miles in 1952. The number of passengers carried for each mile operated decreased from 5.168 in 1946 to 4.637 in 1952.

4. The results of operations for the twelve months ended December 31, 1953, are as follows:

Operating revenues	$1,865,295
Operating expenses	1,529,438
Taxes, other than federal income	204,892
Taxes, federal income	66,000
	$1,800,330
Operating income	$64,965

In testing the adequacy of earnings of a motor carrier the operating ratio is employed by many regulatory bodies. The operating ratio as here used means the relationship of a carrier's expenses to its revenues, usually expressed as a percentage. On the basis of the figures shown above the operating ratio of City Lines was 96.52 for the year 1953, with federal income taxes included in expenses. Excluding federal income taxes the ratio was 92.98.[1]

[2] One of the witnesses for City Lines testified that in his opinion an operating ratio of 90 (after federal income tax) is most practical for City Lines but that a ratio of 90 to 92 is satisfactory. He described a ratio above 92 as being in a critical area. We are not satisfied that the ratios proposed by this witness are necessary to produce reasonable earnings.

5. During the twelve months ended August 31, 1953, City Lines carried 18,097,633 revenue passengers, including 103,405 rides by postal employees transported under contract with the

[1] The reasons for the use of the operating ratio in testing the earnings of a motor carrier were discussed at some length in I. & S. Docket No. 70, Re Salt Lake City Lines, dated May 4, 1951, and will not be repeated in the present findings.

Post Office Department, a decrease of 10.39 per cent when compared with the twelve months ended August 31, 1952. An increase in fares always drives some passengers away. City Lines estimates that if the fare structure stated in Tariff No. 6 were made effective there would be a loss of passengers of 16.32 per cent. This estimate assumes that the decline of 10.39 per cent will continue even under the present fares, and that the difference will represent those passengers who will discontinue riding the buses because of the increased fares. City Lines estimates, therefore, that under the fares stated in Tariff No. 6 it would transport 15,060,000 revenue passengers under regular fares and 110,000 rides by postal employees under contract over a 12-months' period starting with October 1, 1953, with the following results:

Passenger revenue, regular fares	$1,937,243
Passenger revenue, post office contract	9,625
Total passenger revenue	$1,946,868
Charter revenue	110,000
Advertising revenue	38,400
Other revenue	3,100
Total operating revenue	$2,098,368
Total expenses, including federal income tax of $149,400	1,935,786
Operating income	$162,582
Operating ratio	92.25

6. Effective September 1, 1953, National assumed the management and supervision of the operations of City Lines from its office in Chicago, Illinois. Prior to that time Pacific City Lines (a subsidiary of National) performed management services for City Lines. Under contractual arrangements with Pacific City Lines a fee based upon revenues was paid by City Lines for management services. In 1952 this fee amounted to $56,471,[2] which represents 2.81 per cent of the gross passenger and charter revenues of City Lines for that year. The agreement with National provides that City Lines shall reimburse National for a part of the expenses incurred by National in performing services for all of its wholly-owned subsidiaries upon the basis of the ratio of the gross passenger and charter revenue received by City Lines to the total of such gross transportation revenue received by all of the wholly-owned subsidiaries of National.

The evidence shows that the fee to be paid to National by City Lines for these services will approximate 4.78 per cent of gross passenger and charter revenues. If the agreement with National had been in effect in 1952, the fee paid would have been $96,150 compared with the amount of $56,471 actually paid to Pacific City Lines. The higher fee to be paid to National was defended by City Lines on the ground that certain services heretofore rendered in Salt Lake City by local personnel will be provided by the staff of National in Chicago. It was maintained by City Lines that once the transition of the management functions to National is completed, the over-all expenses will be lower than under the former arrangements. Reduced local expenses for traffic supervision, general office salaries and expenses, and for certain other functions were cited as examples. The contention of City Lines may prove to be correct. It is difficult for this com-

[2] In past proceedings involving City Lines the commission has adjusted the fee paid to Pacific City Lines to eliminate any element of profit.

mission, however, to reconcile the substantial increase in the management fee with a picture of declining revenues. Business, in general, ordinarily would seek means to reduce management expenses in the face of depressed revenues.

Data submitted by City Lines at the hearing held on February 18, 1954, indicate a saving in certain local expenses of approximately $5,000 a month, attributable to the new management arrangement, by comparing January, 1954, with December, 1952. The projections of City Lines covering estimated results for a future 12-months' period, shown in (5) above, give no recognition to such savings in expenses, but they do include the full amount ($98,318) of the service fee calculated at 4.78 per cent of passenger and charter revenue. It appears proper, therefore, to reduce the projected expenses by $60,000, to give effect to the estimated annual savings.

The agreement with National sets forth 15 services to be rendered to City Lines in consideration of the fee to be paid. A study of the specific services leaves the commission with a feeling that perhaps some of them could be performed more effectively by Salt Lake City personnel who are familiar with the local problems and situation.

7. As stated in (5) above, the projections of City Lines anticipate a continued decline in number of passengers of 10.39 per cent without taking into account the effect of a further increase in fares. This estimate was made at the first hearing in this matter, held in September, 1953. Subsequent experience seems to indicate that the loss of patronage is greater than anticipated at that time. During the five months from August 1 to December 31, 1953, City Lines transported 6,981,876 revenue passengers compared with 7,950,008 during the same five months in 1952, a decrease of 12.18 per cent. The decline in January and the first fifteen days of February, 1954, was even more pronounced. In the light of this recent experience we believe a revision should be made in the City Lines' estimate of number of passengers to be carried during the next twelve months. The figure will be reduced 2 per cent for this purpose.

[3] 8. The commission finds that an upward revision in the fares of City Lines is necessary. We are not entirely satisfied with the fare structure proposed in Tariff No. 6. That tariff eliminates the weekly pass and the reduced rate for students. We find that it is in the public interest to retain the weekly pass and a special student rate, each of which should stand an equitable part of the over-all increase required. The following fare structure appears to be fair and reasonable:

Adult—Cash (one zone)	$.15
token (one zone)	2/.25
each additional zone	.10
Weekly pass	2.25
Children—5 to 12 years—cash (one zone)	.05
each additional zone	.05
Students—token or ticket (one zone)	13/1.00
each additional zone	same

[4] A reasonable estimate of what the above described fare structure will produce in revenues and earnings is set forth below. This estimate gives recognition to the adjustments in expenses and in number of passengers described in (6) and (7) above, and also reflects a downward adjustment in certain expenses such as insurance that are determined on the basis of

gross revenue. The figures are as follows:

Operating revenues	$1,980,098
Total expenses, including Federal income tax of $132,211[3]	1,847,480
Net operating income	$132,618

The above figures indicate an operating ratio (after federal income tax) of 93.3. The earnings under such a ratio may be somewhat higher than are actually necessary, but we find that this ratio is justified at this time to enable City Lines to comply with the commission's order below respecting an improvement in service.

[5] 9. Numerous people testified in this proceeding on their own behalf or as the representatives of certain organizations or groups. Some of these witnesses voiced opposition to any increase in the fares of City Lines. Others had an interest in maintaining a specific fare at its present level. In general, however, complaints were entered concerning the service provided by City Lines. A common complaint had to do with the long headways on certain routes. Overcrowding of buses during peak periods also came in for a share of the criticism.

If we are to have a transportation system worthy of the name, the service provided must be frequent enough to take care of the reasonable needs of the riders. At the same time it must be recognized by all that if the system is burdened with a great many runs which do not even pay the out-of-pocket costs of operation, the end result is unfavorable also. Looking at the problem abstractly, we cannot say how often a bus should run on a given route. The answer lies in a study which the management should be able and willing to make. We are impressed, however, by the testimony of the witnesses who dealt with the subject of service, that an improvement in headways, and perhaps in the routings, of certain lines should be accomplished. It is not unlikely that improved service might woo back some of the lost riders.

We find no pleasure in authorizing an increase in the fares of City Lines. It appears to us, however, that the question of the maintenance of adequate transportation is the paramount issue. If our community should find itself without a public transportation system the consequences are almost unthinkable. We believe the fare structure set forth above should produce sufficient revenues, under careful management, to provide better service than at present and leave a reasonable return for the owners of the property. At the hearing held in September, 1953, it was testified by the witnesses of City Lines that a comprehensive engineering survey was scheduled for the near future to determine what changes should be made in routings, schedules, and other aspects of the operations. The record in the last hearing discloses the fact that the study has not been started. We think the management of City Lines has been dilatory in not initiating this survey. The commission has been urged by some of the parties to this proceeding to withhold authority for any fare revisions until the study referred to

[3] The provision for federal income tax of $132,211 was computed at the present rate of 52 per cent. Under existing law the rate is scheduled to drop to 47 per cent on April 1, 1954. All indications point to an amendment in the law to provide for a continuation of the 52 per cent rate. Hence it appeared advisable to use a 52 per cent rate in this computation.

has been completed. There is merit in their contention. We are faced with the cold fact, however, that patronage continues to drop off. Service must be continued, even while the survey is under way, and sufficient revenue must be forthcoming to render the service. The safest course seems to require an increase in fares at this time with the express understanding that City Lines will take immediate steps to make the survey herein discussed and promptly make a report to the commission covering the results of such survey. In the meantime, wherever possible, steps should be taken to correct any service deficiencies such as those referred to by the witnesses who appeared at the hearing.

10. Two other factors should be mentioned relating to the expenses of City Lines. A new labor contract became effective September 1, 1953, which provides for an increase of 9 cents an hour in the pay of practically all of the employees. The annual increase in the payroll is some $46,000, based upon the twelve months ended July 31, 1953.

Effective January 1, 1951, Salt Lake City Corporation imposed a new franchise tax on City Lines amounting to 2 per cent of the gross revenues received within the corporate limits of Salt Lake City. This tax exceeds $30,000 a year on the basis of present revenues. At the hearing in the present proceeding it was indicated that Salt Lake City Corporation might relieve City Lines from the payment of this tax in the future. We have had no advice that such action will be taken. We must assume, therefore, that City Lines will be obligated to pay the tax in the future.

The effect of the new wage contract and of the Salt Lake City tax is reflected in the expense figures used above.

Conclusions

Based upon the foregoing findings, the commission concludes that City Lines should be authorized to increase its fares to the level stated in Finding No. 8 above, effective Sunday, March 21, 1954, and that City Lines should take steps immediately to make the traffic survey referred to in Finding No. 9 above, and also to correct present service deficiencies without delay, wherever possible.

MARYLAND PUBLIC SERVICE COMMISSION

Re Baltimore Transit Company

Case No. 5281, Order No. 50862
July 28, 1954

APPLICATION *for approval of restricted stock option incentive plan; dismissed.*

Security issues, § 21 — Restricted stock option incentive plan — Authority of commission.

1. The commission, under a law providing for security issues for the improvement or maintenance of service, has no power to approve a restricted stock option incentive plan not designed for improvement or maintenance of service but designed to provide additional compensation for services rendered by a limited number of officers and employees, p. 152.

Security issues, § 57 — Corporate requirements — Stock option plan.

2. Money to be secured from the issuance of stock under a restricted stock option incentive plan does not meet the requirements of a statutory provision that securities may be issued when the use of capital to be secured by the issuance of securities is reasonably required for the purposes of a corporation, when the company in the past has reacquired and retired much larger amounts of securities than the small capital which would be produced by exercise of the option to purchase stock, p. 152.

Security issues, § 52 — Restricted stock option incentive plan — Public interest.

3. Approval of a restricted stock option incentive plan under which options would be granted to certain officers and employees to purchase stock below the market value is not in the public interest when the amount to be produced by the sale of such securities is not reasonably required for the improvement and maintenance of service, p. 152.

By the COMMISSION: On June 4, 1954, The Baltimore Transit Company, hereinafter called "company", filed with this commission a request that the restricted stock option incentive plan which had been adopted by the board of directors of the company and approved by its stockholders on January 26, 1953, be approved by the commission.

At the meeting of the stockholders held on January 26, 1953, amendments to the charter of the corporation were approved, and the effect thereof was to increase the number of authorized shares of common stock from 200,000 shares to 1,000,000 shares, at the same time providing for 250,000 shares of preferred stock of the par value of $50 each in lieu of the 250,000 shares of the preferred stock of the par value of $100 each then outstanding. Each holder of one share of the old preferred stock received in exchange therefor one share of the new preferred stock and three shares of common stock.

After the amendment to the charter

and on January 27, 1953, the company sought approval of this commission to the plan of reorganization and filed with the commission as an exhibit the proxy statement in which the proposed amendment to the charter and the restricted stock option incentive plan were fully set forth, but the application at that time did not ask for approval of the restricted stock option incentive plan. Acting pursuant to the restricted stock option incentive plan approved by the stockholders, the board of directors have granted to twenty-one officers and employees of the company options to purchase an aggregate number of 52,500 shares of the common stock, options for 51,400 shares having been granted on April 9, 1953 at $3.03 per share and options for 1,100 shares having been granted on February 19, 1954 at $4.75 per share. The total number of shares for which options could have been given is 60,000 shares. Although the restricted stock option incentive plan was originally filed with the commission on February 13, 1953, and options were granted on April 9, 1953, at $3.03 per share, no application was made seeking the approval of this commission until June 4, 1954, when the stock had a market value of $5.75 per share.

[1–3] The commission is confronted with two questions: First, is the plan which has been adopted by the company one which this commission can authorize under the powers granted to it by the legislature; and, secondly, if this commission does have the power to approve the plan, is the same in the public interest? A negative answer to the first question (which we believe to be the case) would make a discussion of the second question unnecessary but, in view of the possibility of an appeal from any decision of this commission, we deem it wise to express our views with respect to both questions.

The company contends that this commission should approve the issuance of the stock for which options have been granted pursuant to the terms of the restricted stock option incentive plan and cites Art 78, § 50 of the Annotated Code of Maryland, as authority for such approval. Section 50 provides, in part, "that a street railroad corporation . . . may issue stock, bonds, notes or other evidence of indebtedness . . . when necessary for . . . the improvement or maintenance of its service, ..." The commission must, therefore, find that the purpose for which the stock is to be issued is for the improvement or maintenance of service of the company. It is argued that because officers and key employees are given the right to subscribe for stock at less than its market value that it is an incentive to such persons to take a greater interest in the company and thereby improve the service which the company renders. This commission cannot see where there will be any improvement in the service of the company if a limited number of persons are given a right which is denied to other employees who have, or should have, just as great an interest in the improvement of the service of the company as the few favored individuals.

Is the restricted stock option incentive plan really designed for the improvement or maintenance of the service of the company or is it designed as additional compensation for services

rendered? None of the employees to whom the options were granted would exercise such option unless he expected to make a profit. If the stock should decline in value, then whatever incentive the employee had would be lost, and it might be argued that because the stock had declined, the interest of the employee also declined, thereby resulting in impairing or lessening the service which he rendered.

The commission is not permitted to authorize the issuance of stock for services rendered by an employee and it would, therefore, seem that this commission has no power to approve the restricted stock option incentive plan.

Furthermore, the very section under which the company seeks approval contains the following proviso: "Provided, and not otherwise . . . in the opinion of the commission, the use of the capital to be secured by the issue of such stocks, bonds, or other evidence of indebtedness is reasonably required for the said purposes of the . . . railroad corporation . . . ." Under no circumstances can it be argued that the money to be secured from the issuance of stock under the restricted stock option incentive plan will be reasonably required for the purposes of the company. We have only to look at the past history of the company to realize how absurd such an assertion would be.

American City Lines, Inc., which company was later merged into National City Lines, Inc., in acquiring control of The Baltimore Transit Company, through the purchase of approximately 30 per cent voting interest therein, acquired a large number of debenture bonds. After the management of the company was in control of the new purchasers and after a sufficient time had elapsed to enable the holders of the bonds to realize a capital gain, bonds held by National City Lines, Inc. were tendered to the company and accepted, and a profit of approximately $650,000 was made by National City Lines, Inc. as a result of their purchase by the company.

In February, 1954, the company acquired and retired 7,500 shares of its preferred stock from National City Lines, Inc. at a price of $210,000, and on March 8, 1954, a similar number of shares of the preferred stock were acquired from National City Lines, Inc. for the sum of $202,500 which stock has been retired. In addition to the bonds which the company acquired from the National City Lines it has retired other debentures. The total face value of debentures so acquired by the company since National City Lines, Inc. acquired control is in excess of five million dollars, and the company has likewise acquired and retired preferred stock purchased from other sources, as follows: as of August 31, 1953, 33,697 shares at an aggregate cost of $1,010,223.85; as of September 30, 1953, 8,293 shares at the cost of $249,748.53; as of January 31, 1954, 3,620 shares at a total cost of $106,828.50; as of February 25, 1954, 1,515 shares at a total cost of $43,556.25. It is, therefore, quite apparent that the company would not purchase debenture bonds and retire preferred stocks in such large amounts if it required the small capital of about $205,000 which would be produced by the exercise of the option to purchase 60,000 shares of stock.

The commission, therefore, finds that the purpose for which a stock is

to be issued does not come within the purview of § 50 and, even if it did, that the capital to be obtained thereby is not reasonably required for the improvement and maintenance of its service.

With respect to the second question, the commission believes that the approval of the restricted stock option incentive plan is not in the public interest. It must be remembered that the petitioner is a public utility and that practically every citizen of the city of Baltimore and adjacent territory is a patron of its service. Those patrons have daily contact with the facilities of the company and while there is much to be desired in the improvement of the services of the company, that improvement should be in the service and maintenance of the facilities of the company and not in a restricted stock option incentive plan. After a review of the history of the management of the company under the National City Lines, Inc. and the financial advantage which have accrued to that company, we believe that approval of the plan would not be in the public interest.

An order will be entered dismissing the application.

CALIFORNIA PUBLIC UTILITIES COMMISSION

Re Barrett Garages, Inc.

Decision No. 50286, Application Nos. 35454, 35462
July 20, 1954

PETITION *for rehearing on commission decision granting passenger stage certificate; denied.*

Procedure, § 32 —Rehearing — Certificate proceeding.

1. An application for rehearing in a proceeding wherein a passenger stage company is granted a certificate of public convenience and necessity will be denied where the points raised in the petition merely restate the contentions in the original hearing, p. 155.

Appeal and review, § 37 — Certificates of public convenience and necessity — Nature.

2. The granting or withholding of a certificate of public convenience and necessity is a legislative act which rests in the discretion of the commission, and presents no question which is subject to judicial review, p. 155.

Monopoly and competition, § 62 — Motor carriers — Different certificates covering same route.

3. The commission may grant a number of certificates of public convenience and necessity covering the same route or routes, p. 155.

By the COMMISSION:

Order Denying Petitions for Rehearing and Reconsideration

Protestants Fialer's Limousines, Inc., and Airline Ground Transportation Association, Inc., have filed petitions for rehearing and reconsideration respecting Decision No. 50229, rendered herein on the 6th day of July, 1954, whereby the applicant in the above-entitled proceedings was granted a certificate of public convenience and necessity to operate between the points and places as a passenger stage corporation as in said decision authorized and prescribed.

[1] The commission has carefully considered the points raised in said petitions. The points therein raised merely restate the matters contended for by petitioners during the hearing of these proceedings. No useful purpose could be served by restating these contentions as they were adequately covered and considered by the decision herein assailed by the instant petitions. In our opinion, the authorities cited by petitioners do not support their contentions.

Petitioners do not desire to introduce additional evidence but ask for argument before the commission in bank.

Apparently, petitioners misconceive the issues of law involved herein.

[2, 3] The instant proceedings present no constitutional issues. The finding of the commission on the question of public convenience and necessity is not subject to judicial review. (Pacific Greyhound Lines v. California R. Commission [1938] 11 Cal 2d 427, 429, 25 PUR NS 350, 80 P2d 971; San Diego & C. Ferry Co. v. California R. Commission, 210 Cal 504, 510, 513, PUR1930E 464, 292 Pac 640; Oro Electric Corp. v. California R. Commission, 169 Cal 466, 471, PUR1915C 191, 147 Pac 118; Asbury Truck Co. v. California R. Commission [DC Cal 1931] 52 F 2d 263, 267 [affirmed per curiam by the Supreme Court of the United States (1932) 287 US 570, 77 L ed 501, 53 S Ct 94].) The scope of review of decisions of this commission was not broadened by the 1933 amendment to § 67 of the Public Utilities Act (now § 1760, Public Utilities Code). (Southern California Edison Co. v. California R. Commission [1936] 6 Cal2d 737, 748, 749, 17 PUR NS 311, 59 P2d 808.) It is elementary that the granting or withholding of a certificate of public convenience and necessity is a legislative act which rests in the discretion of this commission. Such action presents no question which is subject to judicial review. (Asbury Truck Co. v. California R. Commission, *supra*, 52 F2d at p. 267.) The commission may grant a number of certificates covering the same route or routes.

In light of the foregoing authorities and the facts of record, we perceive no merit in the petitions herein. Accordingly, said petitions for rehearing and reconsideration are hereby denied.

SOUTH DAKOTA SUPREME COURT

Re Transport, Inc. of South Dakota

No. 9392
— SD —, 64 NW2d 313
May 15, 1954

APPEAL *from commission's order approving the transfer of certificates to motor carrier; affirmed.*

Certificates, § 143 — Transfer — Public convenience and necessity.

1. The commission, although required to determine whether a proposed transfer of a motor carrier certificate is consistent with and will promote the public interest, may authorize the transfer without determining whether the authorized service is required by public convenience and necessity, p. 158.

Certificates, § 137 — Transfer — Corporation not fully formed.

2. The commission may approve the transfer of a motor carrier certificate to a corporation, notwithstanding that the corporation is not fully formed at the time of the application, where the incorporators are experienced in the field of motor transportation and the proposed corporation will have adequate equipment and finances to continue the authorized services, p. 158.

APPEARANCES: Boyce, Warren, Murphy & McDowell, Sioux Falls, for appellant; Stordahl, May & Boe, Sioux Falls, for respondent; Herman L. Bode, Pierre, Ralph A. Dunham, Attorney General for public utilities commission.

ROBERTS, Judge: This is an appeal from a judgment of the circuit court of Minnehaha county affirming an order of the public utilities commission.

The order of November 6, 1952, approved a request of Transport, Inc. of South Dakota (96 PUR NS 102), for transfer to it of three motor carrier permits (Nos. 6336, 6337, and 6456) issued to Transport Service, Inc., and a motor carrier permit (No. 7254) issued to Transport, Inc. of Moorhead, Minnesota. The three Class B motor carrier permits issued to Transport Service, Inc. authorized it to transport petroleum products from Sioux Falls and Yankton to all points in the state east of the Missouri river and from Sioux Falls to a limited area west of the Missouri river adjacent to U. S. Highways 16 and 18. The Class B carrier permit No. 7254 authorized the holder to transport petroleum products to all points in the state east of the Missouri river and north of U. S. Highway 14. The order authorizing the transfers contains the following restriction: "That Transport Inc. of South Dakota desist and abstain from transporting petroleum products loaded or originating at Watertown, South Dakota (pipeline area) to any

point south of U. S. Highway 14 in South Dakota, or any point west of the Missouri river in South Dakota."

Dan S. Dugan, doing business as a motor carrier under the name of Dugan Oil and Transport Company, resisted the granting of the applications.

A petition for rehearing before the commission was denied and as we have indicated the judgment of the circuit court on appeal affirmed the order of the commission. Protestant and appellant insists that the order approving the transfers should be reversed because (1) there is no finding of convenience and necessity, and (2) the evidence is insufficient to support the findings of the commission that the transfers are consistent with and will promote the public interest and that transferee corporation is able, ready, and willing to assume the status and obligations of a motor carrier.

Statutory directions as applied to transfers of permits or certificates held by motor carriers are embodied in SDC Supp 44.0412: "Any right, privilege, permit, or certificate held, owned, or obtained by any motor carrier may be sold, assigned, leased, transferred, and inherited as other property only by the authorization of the commission. Provided that the sale, assignment, lease, transfer or acquisition through operation of law, of any right, privilege, permit or certificate shall not be approved unless, the commission shall find that such sale, assignment, lease, transfer, or acquisition is consistent with and will promote the public interest."

The establishment of a Class B motor carrier service or the extension of an existing service is governed by SDC Supp 44.0410: ". . . If after hearing upon application for a certificate or permit, the commission shall find, upon the evidence, that public convenience and necessity require the authorization of the service proposed, or any part thereof as the commission shall determine, a certificate or permit therefor shall be issued. Such certificate or permit shall authorize the applicant to operate as a motor carrier from the date thereof until the first day of January next following. In determining whether or not a certificate or permit should be issued, the commission shall give reasonable consideration to the transportation service being furnished, or that will be furnished, by any railroad, or other existing transportation agency, and shall give due consideration to the likelihood of the proposed service being permanent and continuous throughout twelve months of the year and the effect which such proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected thereby."

It appears from these statutory provisions and a reading of the entire act that the legislature was primarily concerned with the creation and maintenance of adequate motor transportation service to the public. What is required for adequate, economical, efficient, and necessary service and in furtherance of the public interest is a matter for the determination of the commission. Re Dakota Transportation (1940) 67 SD 221, 35 PUR NS 442, 291 NW 589;

Re Megan (1942) 69 SD 1, 46 PUR NS 497, 5 NW2d 729. To institute a new service, an applicant has the burden of making an affirmative showing that public convenience and necessity require the proposed service and the ultimate finding by the commission of public convenience and necessity must be based upon the statutory criteria and sufficient evidence to support it. As stated in Re Megan, *supra*, the term "public convenience and necessity" has taken on a rather definite meaning and connotes a determination of public interest based on a weighing of factors having relation to an adequate and efficient transportation system. In Re Svoboda (1952) 74 SD 444, 96 PUR NS 576, 54 NW2d 325, the commission had before it an application requesting approval of a transfer and seeking an amendment of the original certificate. There was no controversy regarding the transfer. The essential issue presented was whether the commission was justified in granting authority to operate in territory not included in the original certificate. That required proof of public convenience and necessity.

[1] The commission cannot approve a transfer unless the same is consistent with and will promote the public interest. This is the standard fixed by § 44.0412, *supra*. Under an amendment of this section by Chap 174, Laws 1939, the commission after hearing could authorize a transfer. The words "after hearing" were deleted from this section by Chap 190, Laws 1941. The matter of the public need for the services was determined when the original certificates herein were issued. We think it would be contrary to the spirit and intent of the statute to require a hearing in each instance and impose the burden upon the transferee to show the existence of public convenience and necessity as a prerequisite to the authorization of a transfer. Indianapolis & Southern Motor Express v. Indiana Pub. Service Commission (1953) — Ind —, 112 NE2d 864; Ramsey v. Ohio Pub. Utilities Commission (1926) 115 Ohio St 394, 154 NE 730; Sale v. California R. Commission (1940) 15 Cal2d 612, 36 PUR NS 469, 104 P2d 38; University City Transfer Co. v. Florida R. Commission (1936) 124 Fla 308, 168 So 413. That determination as above stated was had when the original certificates were issued and, in the absence of proof to the contrary, the assumption is warranted that public convenience and necessity require continuation of the services previously authorized. In Hostetter v. Pennsylvania Pub. Utility Commission (1946) 160 Pa Super Ct 94, 67 PUR NS 195, 198, 49 A2d 862, 864, commenting upon an analogous situation, the court said: "It is only an application of a familiar and elementary common law principle, the so-called presumption of continuance doctrine, by which a condition of a continuous nature once established may be assumed to continue until the contrary is shown."

[2] Protestant contends that applicant was without corporate existence and could not invoke the authority of the commission to approve the transfers. It is admitted that the corporation had not been fully formed. We think that the record contains ample evidence to sustain the action of the commission. The evidence was that

the incorporators and persons interested in the venture are experienced in the field of motor carrier transportation, that the corporation will have adequate equipment to continue the authorized services and that it will have adequate finances. Protestant submitted no testimony and made no direct attack on the fitness or financial ability of the incorporators to complete the incorporation and to perform the services authorized. There is no requirement of statute that the corporation be in existence at the time an application is heard. See Central Freight Lines v. Sadler (Tex Civ App 1941) 147 SW2d 1102. The commission under the provisions of § 44.0412, *supra,* was concerned with protecting the public interest and to this end it determined the fitness and ability of the proposed transferee to render the authorized services.

Judgment appealed from is affirmed.

All the judges concur.

NEW YORK PUBLIC SERVICE COMMISSION

Re Mary F. Kilborne

Case 16901
July 22, 1954

APPLICATION *for temporary certificate to operate omnibus line; application approved.*

Certificates, § 77 — Ability of applicant — Temporary certificate — Omnibus service.

1. An application for a temporary certificate to operate an omnibus line should be approved when there is an immediate and urgent need for this service in an area, notwithstanding that the facilities and equipment of the applicant fail to meet commission requirements as to safe and comfortable service in city operation, p. 160.

Certificates, § 77 — Ability of applicant — Permanent certificate — Omnibus service.

2. An application for permanent authority to operate an omnibus line will not be approved unless the operator possesses sufficient equipment suitable for regular city bus service and gives evidence of proper financial responsibility, p. 160.

By the COMMISSION: Omnibus service was discontinued in the city of Auburn and surrounding territory by Shaw & Ben Benderly, d/b/a Auburn Bus Company, about noon July 15, 1954. The equipment formerly used by the company in rendering service has been repossessed by the owner and its insurance coverage canceled. Consequently there appears to be no possibility of service being resumed by the Auburn Bus Company.

On July 20, 1954, this commission received an application from Mrs. Mary F. Kilborne of Auburn, New York, for the issuance of a certificate authorizing her to provide temporary omnibus service in the city of Auburn and surrounding territory, formerly served by Auburn Bus Company.

This commission has been urged by the mayor of the city of Auburn and other public officials to grant temporary authority to the applicant in view of the immediate and urgent need for omnibus service in the communities formerly served by Auburn Bus Company. By reason of the emergency nature of the situation, this commission convened today and held a special session for the purpose of considering the application of Mrs. Kilborne.

[1] The applicant's equipment consists of school buses which, by the nature of their design, fail to meet this commission's requirements as to providing safe and comfortable service in city operations. In this emergency, however, the commission has concluded to grant temporary authority to the applicant, but only for a period of time sufficient for applicant to secure equipment which does comply with the commission's rules. During this period, applications by other operators for this authority will be entertained.

[2] Any application for permanent authority must be made by an omnibus operator possessing sufficient equipment suitable for regular city bus service and with proper financial responsibility in order that safe and adequate bus service for the public may be provided upon a permanent basis.

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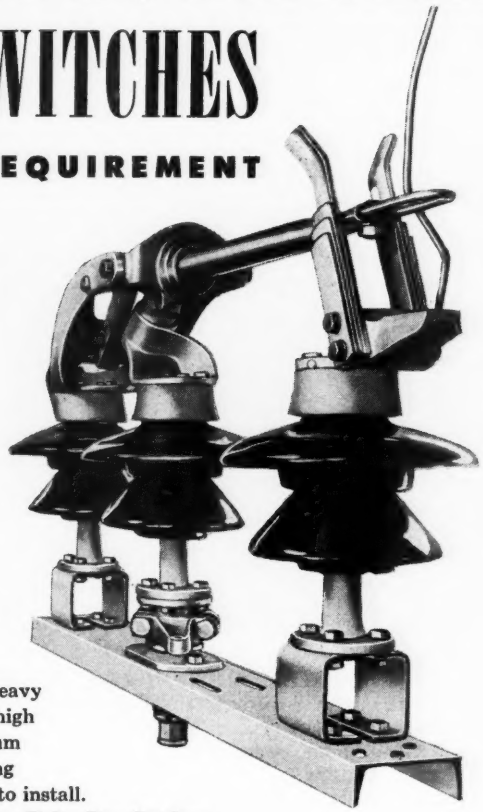
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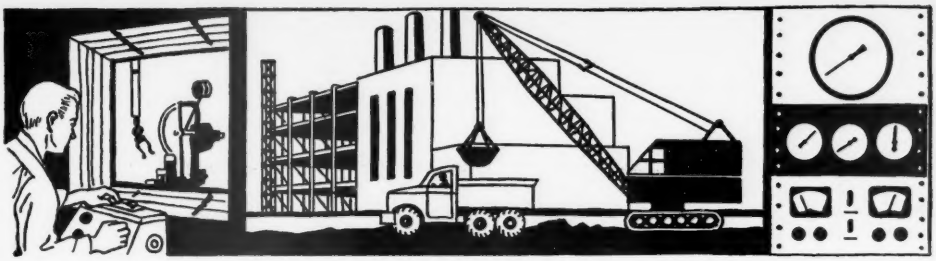
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Industrial Progress

PG&E Plans $37,600,000 Project

NSTRUCTION of Pacific Gas l Electric Company's Poe hydro-tric project on the North Fork of Feather river has been authorized the company, according to Norman Sutherland, PG&E vice president l general manager. The company s appropriated $37,600,000 for the ject, Mr. Sutherland said.

The Poe project will develop 106,- kilowatts of electricity. It will sist of a concrete diversion dam 60 t high about 2 miles downstream m PG&E's Cresta powerhouse, a mel 6½ miles long with a surge mber at the downstream end, two el penstock pipes, and the power-use, which will have two generating its.

Poe project is another step in the mpany's development of hydroelec-c resources on the Feather river. G&E now has six generating plants th an aggregate capacity of 382,000 owatts in its Feather river system.

Literature Available on New Le Roi Utility

TWO-PAGE bulletin has just be-me available on the Le Roi 105 cfm tility air compressor.

The manufacturer reports that the tility has been placed back into the Roi line after an absence of sev-al years following heavy demand on the field and that it features bet-r air cleaning and cooling through e use of oil bath air cleaners and a es urized cooling system.

According to the bulletin, the 105 tility was specially designed for pub-utility service. Installation draw-gs on the new literature show that e width is 25 in. and the overall gth is only 82 in. This length allows e Utility to be mounted transversely gainst a truck cab without exceeding the maximum truck width regulation for any state.

Copies of the bulletin may be obtained from: Le Roi Company, Attn: Advertising Department, 1706 S. 68th St., Milwaukee 14, Wis.

W. G. McKie Appointed Chairman of Bureau Home Lighting Committee

WALTER G. McKie, general sales manager of Rochester Gas and Electric Corporation, Rochester, N. Y., has been appointed chairman of the Home Lighting Education Committee of the Better Light Better Sight Bureau, it was announced by H. A. Stroud, bureau chairman.

Mr. McKie has been employed with Rochester Gas and Electric in various capacities since 1922, with the exception of five years, from 1929-34, when he was manager of lighting sales for the Metropolitan Edison Company of Reading, Pa.

He was associated with the Better Light Better Sight program at Rochester Gas and Electric as far back as 1934, when the movement first started.

New Cover for Distribution Transformers Announced By G-E

A NEWLY-DESIGNED cover for General Electric pole-type distribution transformers that increases transformer life and simplifies maintenance has been announced by the company's Distribution Transformer Department, Pittsfield, Mass.

Main features of the design are one-piece, stainless steel clamping bands on the tank cover, handhole cover and bushings, and a circular, instead of eliptical, handhole.

G-E engineers said stainless steel bands prevent rust and corrosion, are easier to take off for inspection and maintenance, and are just as easy to replace as former cover parts. The rounded handhole offers easy accessibility for adjustments within the tank and establishes a uniform seal when covered, the engineers said.

Because of the one-piece construction, pressure on the covers and bushings is distributed evenly, assuring an air-tight seal and offering maximum protection against oil contamination, even after long service, according to the engineers.

Electro-Motive Division Names Public Utility Consultant

APPOINTMENT of Emerson A. Armstrong as consultant on public utility products and sales of Electro-Motive Division of General Motors is announced by N. C. Dezendorf, vice president of General Motors and general manager of Electro-Motive at LaGrange, Ill.

Mr. Armstrong was retired by Commonwealth Edison Company of Chicago June 1st. He had been manager, industrial sales for Commonwealth Edison since 1952 when that company absorbed the Public Service Company of Northern Illinois. He was manager of industrial power sales for the Public Service Company from 1923 to 1952.

A-C Releases New Literature on Steam Turbine Trends

TODAY'S trends in steam turbine design is the subject of new literature released by Allis-Chalmers Manufacturing Company.

Discussed are such trends as the development of close-coupled cross-compound turbines for large capability applications; the rapid increase in size of available 3600-rpm tandem machines, and the widespread application of reheat for improved turbine performance.

The literature also calls attention

(*Continued on page 28*)



machine-digging in

City Congestion Above and Below Ground

THE MINNEAPOLIS GAS COMPANY recently installed gas mains in such major downtown thoroughfares as Fifth St., Sixth St., Nicollet Ave., and Second Ave. S., in connection with one of the city's biggest repaving programs in years. Shown here are crews of Minnesota Williams Company putting in one of these lines under Fifth St. between Nicollet and Hennepin Aves.

The compactness of the CLEVELAND Trencher and its maximum operator visibility and control—inherent in all CLEVELANDS—made machine-digging practical on this job despite traffic problems and numerous underground obstructions. Advantages like these, enabling CLEVELAND owners to dig *more trench, in more places at less cost,* have earned outstanding preference for CLEVELANDS—among contractors, utilities and municipalities, alike.

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to the use of optimum size exhau for reducing leaving loss and to development of more compact chines to obtain the benefits of redu investment in building and foun tions.

Authored by C. D. Wilson and E. Hansen of Allis-Chalmers steam t bine section, the material is a repr from the 2nd Quarter, 1954, All Chalmers Electrical Review.

Copies of "Today's Trends and T morrow's Turbines," 03R8182, a available on request from Allis-Chal ers Manufacturing Company, 965 70th Street, Milwaukee, Wis.

New Meyercord Decals Resis High Temperatures

THE Nameplate Department of T Meyercord Company, Chicago, Il nois, decalcomania manufacturer, a nounces availability of the followi three new types of heat resista decals for industrial application:

Type HR—A decal especially d signed for application to laminat metal surfaces such as transform cores, flexible shafts and casings. Th are said to be completely effective to constant temperatures of 400°;

Type SHR—A decal designed withstand constant operating temper tures in the area of 500 to 600 degree One hour curing is considered ad quate, although for resistance to u usual abrasion it is desirable to cu longer at higher temperatures;

Type HHR—A new developme in decals that may be subjected to in termittent temperatures up to 100 degrees without damaging effec When cured at temperatures of 50 to 600 degrees, this decal will resi virtually any type of commonly use solvent.

For further information, write Th Meyercord Co., 5323 West Lak Street, Chicago 44, Illinois.

Wisconsin Electric Power Continues Expansion Program

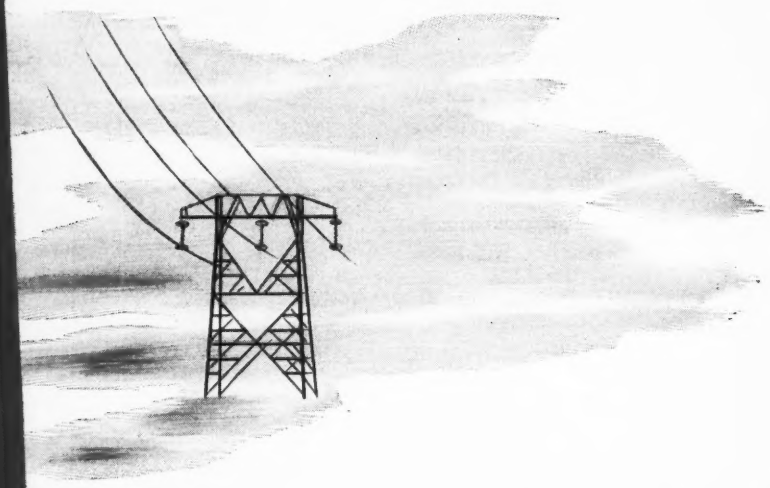
WISCONSIN Electric Power Com pany reports that construction is pro ceeding on the second and third 120 000 kilowatt generating units at th new Oak Creek power plant. Buildin construction has been completed fo Unit No. 2 and installations of boilers turbines and other equipment is now proceeding.

Plans call for the completion o Unit No. 2 this year and the comple tion of Unit No. 3 during the winte months of 1955-56.

(*Continued on page* 30)

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AGE System to Increase Plant Capability To 4,120,000 KW in 1956

THE present generating capability of the American Gas and Electric System is 3,785,000 kilowatts, according to figures recently released by S. N. Fiala, chief engineer of the AGE Service Corporation.

That figure will be increased to an even 4,000,000 kilowatts when Unit 3 at the Indiana & Michigan Electric Company's Tanners Creek plant goes into service in December of this year, and to 4,120,000 kilowatts when Unit 6 at Ohio Power Company's Philo plant is placed in service in May, 1956.

After a review of operating experience and performance of the various generating units throughout the System, several revisions in unit capabilities have been made. The new units at Ohio Power Company's Muskingum river plant at Appalachian Electric Power Company's Kanawha river plant and at Tanners creek plant have been increased from 200,000 kilowatts to 215,000 kilowatts. The other two units at Tanners Creek plant, formerly rated at 150,000 kilowatts, have been increased to 155,000 kilowatts.

The new figures show that when the new Philo and Tanners Creek units are completed, 95.8 per cent of the System's generating capability will be provided by steam plants, and the remaining 4.2 per cent by hydro-plants. Steam plants, when the two units now under construction are completed, will generate 3,946,000 kilowatts, as compared with 174,000 kilowatts for the hydro plants.

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DISTINCTIVE correspondence, reflecting the individuality of the writer, can now be achieved on a Remington electric, standard or noiseless typewriter through the introduction of a large variety of executive type styles by Remington Rand Inc., according to announcement by the company.

These type styles are designed to suit individual preference and also complement a company's business letterhead. In addition, the color of the typewriter ribbon can be harmonized with the color in the business letterhead to further enhance correspondence. Special keyboard arrangements can also be styled to speed up typing jobs through the inclusion of often used symbols.

For further information, contact a local Remington Rand sales office or write Remington Rand Inc., 315 Fourth avenue, New York 10, New York, and request folder #R8685.

Peoples Natural Gas Receives Accident Prevention Award

THE Peoples Natural Gas Company received the Accident Prevention award for outstanding accident prevention work at the recent Sixth Annual Conference sponsored by the Accident Prevention Committee of the American Gas Association.

Leo R. Nuhfer, safety director of The Peoples Natural Gas Company, and chairman of the American Gas Association Accident Prevention Committee, accepted the award for the company.

Such awards are made each year to companies which have reduced the frequency of accidents 25 per cent or more in 1953 as compared with 1952.

Safety Council Presents Award To Ohio Power

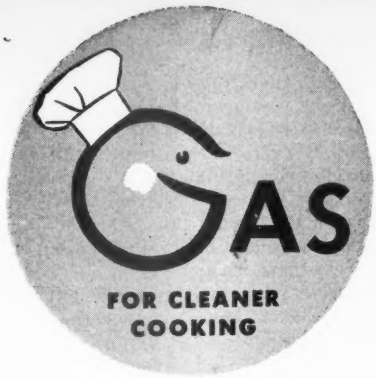
FOR the second consecutive year, the Ohio Power Company has been presented an award of merit by the National Safety Council in recognition of the company's 1953 safety record.

Ohio Power was one of 11 electric utilities of 35 evaluated to receive this honor, which is given to companies establishing injury rates significantly lower than the average rate of the entire electric industry and the individual company for the previous three years.

Central Illinois Public Adding New Unit to Grand Tower Station

THE Central Illinois Public Service Company's 100,000 kilowatt generating unit authorized by the board of directors on September 7th, will be added to the Grand Tower power station on the Mississippi river in Jackson county according to a statement made recently by Vice President J. R. Broderick.

"With the completion of this new unit, scheduled for 1957, the total generating capacity of the company will be four times as great as it was at the end of World War II. This tremendous increase in generating capacity assures an ample power supply for new industries, the growing commercial, residential, farm and rural electric co-ops use."



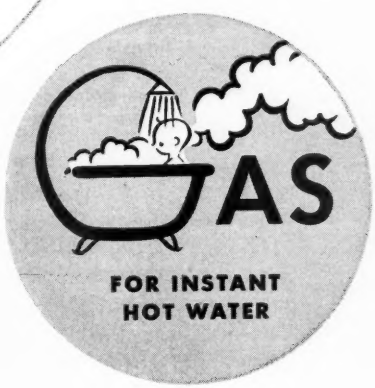




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New Unit Doubles Output of Central Hudson's Danskammer Generating Station

ELECTRIC generating capacity of Central Hudson Gas & Electric Corporation's Danskammer Point Steam Station was doubled recently when a second 70,000 kilowatt unit was switched into commercial operation. Nearly five years and more than $25,000,000 have gone into the construction of the modern electric generating station, six miles north of Newburgh on the west bank of the Hudson river.

Once the scene of Indian tribal rites and war dances, Danskammer Point is today the site of one of the most efficient plants of its type in the United States. One kilowatt-hour of electricity is generated from less than three-quarters of a pound of coal, while the average in the nation's steam generating plants is about one pound.

Television plays an important r in the Danskammer plant's operati Two screens give the operators a p ture of conditions in the furnaces a the two others provide a picture the water level gauges at the top the 100-foot high boilers.

The station, while the first unit on was in operation, was rated the six most efficient steam electric generati plant in the United States in 1952 a report of the Federal Power Co mission.

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Revised Film On "Clean Water Announced By G-E

A new version of "Clean Waters a film calling attention to pollution water resources, will be premiered the General Electric Company at t annual meeting of the Federation Sewage and Industrial Wastes Ass ciation in Cincinnati, October through 14.

Latest in the company's More Po er to America series, the 25-minut full-color, sound motion picture is d signed to create an awareness to t growing of stream pollution and enli public and industry support for pr grams geared to meet the proble according to the announcement.

Dramatizing the importance of clea water to the individual and his com munity, the 16 mm. film outlines t need for immediate action to comba existing and future pollution areas order to assure safe water for healt and recreational purposes. The fil outlines the toll wrought on water re sources by pollution, caused in part b a rising national population and a expanding industrial front.

The film also prescribes the remedy "improved expanded water supplie through more industrial waste treat ment, modernized municipal sewag disposal plants, and construction o municipal treatment facilities wher non exist."

San Diego Gas & Elec. Plans $26,000,000 Expansion

SAN Diego Gas & Electric Company plans to spend $26,000,000 on con struction in 1954, according to E. D Sherwin, president. This is the high est figure in the company's history.

Of that amount, approximately $9,000,000 will be spent at the new Encina station, where generating Unit No. 1 is being installed and will be placed in operation in fall of this year.

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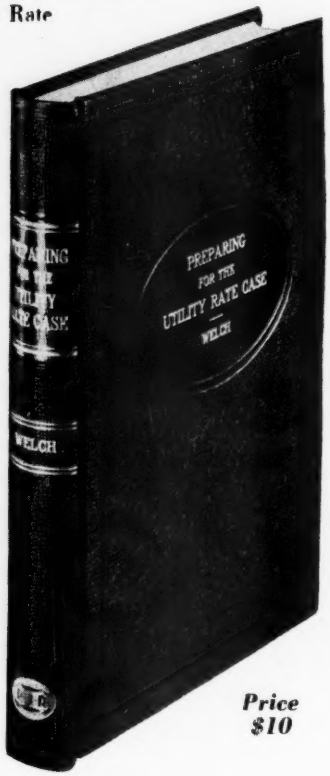
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